FEDERAL TRADE COMMISSION DECISIONS

▽

FINDINGS, OPINIONS, AND ORDERS JULY 1, 1977 TO DECEMBER 31, 1977

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MEMBERS OF THE FEDERAL TRADE COMMISSION AS OF DECEMBER 31, 1977

MICHAEL PERTSCHUK, *Chairman.*
Took oath of office April 21, 1977.

PAUL RAND DIXON.
Took oath of office March 21, 1961.

ELIZABETH HANFORD DOLE.
Took oath of office December 4, 1973.

CALVIN J. COLLIER.
Took oath of office March 24, 1976.

DAVID A. CLANTON.
Took oath of office August 26, 1976.

CAROL M. THOMAS, *Secretary.*
Took oath of office June 20, 1977.

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FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions and Orders

IN THE MATTER OF

OLIN SKI COMPANY, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2895. Complaint, July 19, 1977 — Decision, July 19, 1977

This consent order, among other things, requires a Middletown, Conn. manufacturer and distributor of ski boots and other ski industry items to cease establishing, maintaining, and enforcing price maintenance agreements; requiring such agreements as a precondition to dealing; soliciting reports of recalcitrant distributors and terminating those dealerships; using serial numbers as a means of tracing products sold to unauthorized outlets; and failing to honor warranties for products sold by such establishments. Further, the order requires the respondents to maintain prescribed files for a five-year period; and prohibits them from disseminating, for two years, all materials suggesting resale prices.

Appearances

For the Commission: *David W. Dinardi.*

For the respondents: *Allen F. Maulsby, Cravath, Swain & Moore,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Olin Ski Company, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (38 Stat. 719, as amended; 15 U.S.C. 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Olin Ski Company, Inc., hereinafter referred to as respondent, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at 475 Smith St., Middletown, Connecticut.

PAR. 2. Respondent has been and is now engaged in the manufacture, sale or distribution of skis, ski boots or other ski industry items, hereinafter referred to as said products. Said products are subse-

quently distributed and sold throughout the United States for resale to the general public through authorized dealers who have signed with respondent an Authorized Dealership Agreement (hereinafter authorized dealers).

PAR. 3. In the course and conduct of its business as aforesaid, respondent has been engaged and is now engaged in commerce or its acts and practices affect commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, in that respondent has sold and caused and now causes said products to be shipped from the state in which they are manufactured or warehoused to other States of the United States for resale and distribution through authorized dealers to the general public.

PAR. 4. Except to the extent that competition has been hampered, hindered, lessened or restrained as set forth in this complaint, respondent has been and is now in competition with other persons, firms and corporations engaged in the manufacture, sale and distribution of said products in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 5. Respondent, in combination, agreement, or understanding with certain of its authorized dealers, has for the last several years been engaged in a course of action to fix, establish and maintain certain resale or retail prices at which said products are resold to the general public. In furtherance of said course of action, respondent has for the past several years engaged in the following acts or practices, among others:

(a) Regularly furnishing its authorized dealers with price lists and necessary supplements thereto containing certain resale or retail prices;

(b) Establishing agreements, understandings, or arrangements with its authorized dealers, one or more of whom are located in states which did not have fair trade laws, as a condition precedent to the granting of a dealership, that such authorized dealers would maintain certain resale or retail prices for said products or such dealership would be terminated; and that respondent would not honor a guaranty on said products sold by other than an authorized dealer of respondent;

(c) Requiring its authorized dealers to execute an Authorized Dealership Agreement under the terms of which such authorized dealers agree, among other things; That said products shipped to them by respondent will be sold at the retail level; and To resell to respondent any unsold stock of said products in the event that business relations between respondent and its authorized dealers are terminated;

(d) Affixing serial numbers on all skis shipped by respondent to its authorized dealers for the purpose of tracing sales of such skis by authorized dealers to unauthorized retail outlets;

(e) Soliciting and obtaining from its authorized dealers, cooperation and assistance in identifying and reporting any authorized dealer who advertises, or offers to sell, or sells said products at prices lower than certain resale or retail prices;

(f) Contacting those authorized dealers who fail to adhere to and maintain certain retail or resale prices for said products and securing, or attempting to secure, assurances from such authorized dealers that they will adhere to and observe respondent's resale or retail prices;

(g) In certain instances threatening to terminate and terminating authorized dealers who fail or refuse to observe, maintain or advertise respondent's resale or retail prices for said products.

PAR. 6. By means of such acts and practices, including but not limited to the foregoing, respondent, in combination, agreement, or understanding with certain of its authorized dealers, has established, maintained and pursued a course of action to fix and maintain certain resale or retail prices at which said products will be resold.

PAR. 7. The aforementioned acts and practices of respondent have been and are now having the effect of hampering and restraining competition in the resale and distribution of said products, and constitute unfair methods of competition in commerce, all in derogation of the public interest and in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Boston Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, which order incorporates an agreement of Olin Corporation, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in

such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Olin Ski Company, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business at 475 Smith St., Middletown, Connecticut.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I. *It is ordered,* That respondent Olin Ski Company, Inc., a corporation, or any of its subsidiaries, divisions, successors and assigns, and its officers, and respondent's agents, representatives and employees, individually or in concert, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, manufacture, distribution, offering for sale or sale of skis, ski boots or other ski industry items (hereinafter referred to in this order as "said products") in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

A. Establishing, maintaining or enforcing with any authorized dealer any contract, agreement, understanding or arrangement fixing, establishing, maintaining, controlling or enforcing, directly or indirectly, the price at which any of said products is advertised, sold or offered for sale at retail.

B. Requiring any authorized dealer or prospective dealer to enter into an oral or written agreement or understanding that such authorized dealer or prospective dealer will maintain any resale or retail price for any of said products as a condition of buying any of said products.

C. Prior to selling to a prospective dealer, requiring a promise or assurance, whether by understanding, agreement, or otherwise, that

such dealer will adhere to and observe any resale or retail price for any of said products.

D. Requiring from any authorized dealer a promise or assurance to adhere to any resale or retail price for any of said products as a condition precedent to any future sales to said authorized dealer.

E. Requesting or requiring, either directly or indirectly, any authorized dealer or prospective dealer to report any authorized dealer who does not adhere to any resale or retail price for any of said products.

F. Terminating or threatening, either directly or indirectly, to terminate any authorized dealer for the reason that such dealer had been reported as not adhering to or observing any resale or retail price for any of said products.

G. Terminating or threatening, either directly or indirectly, to terminate any authorized dealer because of any resale or retail price observed, maintained, or advertised by the authorized dealer for any of said products.

H. For two (2) years from the date on which this order becomes final, publishing or circulating any suggested resale or retail price for any of said products by price list, discount schedule, invoicing procedure, pre-pricing of commodities or their containers, or by any other such means, to any reseller or authorized dealer.

I. After the expiration of the time period stipulated in provision H above, publishing, disseminating or circulating to any reseller or authorized dealer any price list, price book, price tag, advertising or promotional material, or other document indicating any resale or retail price of said products unless each reference to such price is accompanied by a clear and conspicuous disclosure that the price is suggested or approximate.

J. Refusing to honor a guaranty on any of said products for the reason that said product was not sold by an authorized dealer of respondent.

K. Requiring or inducing by threats of termination any authorized dealer or prospective dealer to refrain, or to agree to refrain from reselling any of said products to any independent dealer or distributor.

L. Using serial numbers, registration numbers or other similar identifying marks on said products as a means of tracing sales of said products to particular authorized dealers where the purpose of such tracing is to terminate or threaten to terminate authorized dealers of respondent selling said products to unauthorized dealers.

M. Requiring any authorized dealer to resell to respondent any unsold stock of said products in the event that business relations

between respondent and the authorized dealer are terminated; *provided, however,* that respondent shall not be prohibited from repurchasing such unsold stock with the consent of an authorized dealer, or where respondent has a "security interest" in said products, or where the authorized dealer is unable to meet its financial obligations to respondent.

II. *It is further ordered,* That respondent shall, within fifty-nine (59) days after service upon it of this order, mail to all current authorized dealers of said products, on official stationery of respondent, together with a copy of this order, a copy of the letter signed by the President of respondent, attached hereto as Exhibit A, and furnish the Commission proof of the mailing thereof.

III. *It is further ordered,* That respondent, during the five (5) year period of time following the date of service of this order, shall furnish to all future authorized dealers of said products at the time said dealers are opened as accounts a copy of this order, together with a copy of the letter attached hereto as Exhibit A.

IV. *It is further ordered,* That respondent shall forthwith distribute a copy of this order to each of its operating divisions and subsidiaries now engaged in the manufacture, sale and distribution of said products and to all of its officers and directors now engaged in the manufacture, sale and distribution of said products.

V. *It is further ordered,* That respondent shall, within thirty (30) days from the date of service of this order, mail or deliver, and obtain a signed receipt therefor, a copy of this order to all of its sales personnel and sales representatives then engaged in the distribution, offering for sale or sale of said products.

VI. *It is further ordered,* That respondent notify the Commission at least thirty (30) days prior to any proposed change in respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation of or dissolution of subsidiaries or any other such change in the corporation which may effect compliance obligations arising out of the order.

VII. *It is further ordered,* That respondent, for a period of five (5) years from the date of service of this order, maintain files of all records referring or relating to respondent's termination of any authorized dealer, which files shall contain a record of any written communication to each such dealer explaining such termination, and which files will be available for Commission inspection on reasonable notice; and, annually, for a period of five (5) years from the date of service, submit a report to the Commission listing the names and addresses of all authorized dealers whom respondent has terminated

during the preceding year, a description of the reason for the termination and the date of the termination.

VIII. *It is further ordered,* That the agreement of Olin Corporation, the parent corporation of the respondent, which agreement is in the form of an affidavit of the President of Olin Corporation, attached hereto as Exhibit B, be incorporated herewith into this order.

IX. *It is further ordered,* That respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

EXHIBIT A

(Letterhead of Olin Ski Company, Inc.)

(date)

Dear Authorized Olin Ski Dealer:

We have agreed with the Federal Trade Commission to inform you that the Federal Trade Commission has entered into a consent order with the Olin Ski Company, Inc.

Our agreement to the issuance of a consent order was for settlement purposes only and does not constitute an admission that the law has been violated by us in connection with the marketing of skis, ski boots and other ski industry items.

Subject to the provisions of the enclosed consent order:

(1) You are free to set your own retail or resale prices for our products;

(2) We will not solicit, invite or encourage you or any other person to report that any authorized dealer is not following any retail or resale price for any of our products, and, further, we will not act on any such reports sent to us; and

(3) We will not require any authorized dealer to refrain from advertising our products at any price or from selling or offering our products at any price to any person.

As a result of the consent order, you are free to determine independently your own pricing policy with respect to the advertising, offering for sale and sale of our products without interference by us and without jeopardy from such determination to your status as an authorized dealer.

Very truly yours,

President

EXHIBIT B

UNITED STATES OF AMERICA BEFORE FEDERAL TRADE COMMISSION

In the Matter of

OLIN SKI COMPANY, INC., File No. 731 0049

a corporation AFFIDAVIT OF JOHN M. HENSKE

STATE OF CONNECTICUT, SS.:

COUNTY OF FAIRFIELD,

JOHN M. HENSKE, being duly sworn, deposes and says:

1. I am the President and a Director of Olin Corporation (Olin), whose wholly-owned subsidiary, Olin Ski Company, Inc., (Olin Ski), is the respondent herein.

2. Olin Ski will today execute with counsel for the Federal Trade Commission an Agreement Containing Consent Order to Cease and Desist pertaining to future marketing practices in the manufacture, sale or distribution of skis, ski boots or other ski industry items.

3. Olin will undertake to have Olin Ski fulfill all its obligations under the aforementioned agreement.

4. Olin will notify the Commission at least thirty days prior to any proposed change in Olin Ski such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation of or dissolution of subsidiaries or any other such change in the corporation which may affect compliance obligations arising out of the order.

5. In the event that Olin Ski is sold, assigned or otherwise disposed of by Olin to any other person, firm, partnership or corporation, Olin will insert in the agreement of purchase a provision specifying that the purchaser or assignee is a successor to or assignee of the obligations of Olin under the order.

6. In the event that Olin dissolves Olin Ski and/or Olin Ski discontinues the manufacture, sale or distribution of skis, ski boots or other ski industry items, and if Olin at any time in the future manufactures, sells or distributes skis, ski boots or other ski industry items, Olin will become a successor to or assignee of the obligations of Olin Ski under the order.

/s/JOHN M. HENSKE

Sworn to before me this
19th day of April 1976.
/s/Pauline E. Altieri
Notary Public
My Commission Expires April 1, 1981

IN THE MATTER OF

CBS INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2896. Complaint, July 21, 1977 — Decision, July 21, 1977

This consent order requires a New York publishing firm to cease mailing and billing for unauthorized magazines; sending collection letters to receivers of unordered magazines; misrepresenting the effects of nonpayment on credit ratings in such letters; and transferring unpaid accounts to recipients of unsolicited magazines to debt collection or consumer reporting agencies. Further, the order requires respondent to make proper restitution to individuals who paid for unordered magazines; and to send correction letters to consumers whose credit standings may have been adversely affected by respondent's actions. Additionally, respondent is required to maintain prescribed records; and to institute an adequate program of continued surveillance to ensure conformance with the terms of the order.

Appearances

For the Commission: *Paul P. Eyre* and *John M. Mendenhall.*

For the respondent: *Edward Kelman* and *Jerry Ebenstein,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that CBS Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent CBS Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 51 West 52nd St., New York, New York. Respondent conducts its publishing of magazines through its CBS Consumer Publishing Division of the CBS Publishing Group, located at 600 Third Ave., New York, New York.

PAR. 2. Respondent, through its CBS Consumer Publishing Division, is now, and has been, engaged in the business of publishing, distributing, offering for sale, and selling various types of magazines.

PAR. 3. In the course and conduct of its magazine business, through

its CBS Consumer Publishing Division, respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. In late 1974 and early 1975, respondent, in the course and conduct of its magazine business through the CBS Consumer Publishing Division, in connection with the publishing, distributing, offering for sale, or selling of *Field & Stream* magazine:

(a) Ran a sweepstakes promotion in conjunction with a subscription campaign for *Field & Stream* magazine. In order to enter the sweepstakes, consumers were requested to sign an entry card and check a box to indicate whether the consumer wanted only to enter the sweepstakes or to also subscribe to *Field & Stream.* A number of people returning the card did not check either box. Respondent, through the CBS Consumer Publishing Division, sent copies of *Field & Stream* magazine to consumers who did not check either box, as well as those who checked the subscription box.

(b) Has mailed, or caused to be mailed, to persons who received such magazines without having checked either box, a bill for such magazines.

(c) Has mailed, or caused to be mailed, persistent demands for payment to persons who received such magazines without having checked either box.

Pursuant to the Postal Reorganization Act, Section 2, 39 U.S.C. 3009 (1970), the aforesaid acts and practices of respondent's CBS Consumer Publishing Division constituted a violation of Section 5 of the Federal Trade Commission Act, as amended.

PAR. 5. In the course and conduct of its business, and in connection with the publishing, distributing, offering for sale, or selling of *Field & Stream* magazine, respondent, through its CBS Consumer Publishing Division, transferred, or caused to be transferred, the purportedly due or delinquent accounts of those consumers who received copies of *Field & Stream* magazine and who did not indicate on the sweepstakes entry card whether they desired the magazine subscription to a debt collection agency or consumer reporting agency, for the purpose of collecting the subscription price for such magazines or for the purpose of including information in the consumer files of said agencies.

The aforesaid acts and practices constituted a violation of Section 5 of the Federal Trade Commission Act, as amended.

PAR. 6. Respondent, through its CBS Consumer Publishing Division, has used the acts and practices set forth in Paragraphs Four and Five, to induce persons who received copies of *Field & Stream*

magazine without having checked either box to pay the subscription price for such magazine. Respondent's CBS Consumer Publishing Division has received the said sums from some of such persons, and has failed to offer refunds, or refund such sums to said persons.

The use by respondent, through its CBS Consumer Publishing Division, of the aforesaid acts and practices constituted, and respondent's continued retention of said sums of money as aforesaid constitutes, a violation of Section 5 of the Federal Trade Commission Act, as amended.

PAR. 7. Respondent, in the course and conduct of its business, through its CBS Consumer Publishing Division, for the purpose of inducing consumers to pay due or delinquent accounts, has transmitted, or has caused to be transmitted, to consumers, form letters demanding payment, representing that:

(a) If the consumer does not respond to a collection letter within a specified period of time, such consumer's account will be transferred to a consumer credit reporting agency for immediate inclusion in a national bad debt file;

(b) A consumer's account has been transferred to a credit collection manager of respondent's credit collection department.

PAR. 8. In truth and in fact:

(a) The failure of a consumer to respond to a collection letter within a specified period of time did not automatically result in the transferral of such consumer's account to a consumer credit reporting agency for immediate inclusion in a national bad debt file;

(b) The consumer's account was not transferred to a credit collection manager of respondent's collection department.

Therefore, the representations set forth in Paragraph Seven hereof were false, and had the tendency and capacity to mislead members of the public, and to induce the payment of delinquent accounts.

PAR. 9. In the course and conduct of its magazine business through its CBS Consumer Publishing Division, and at all times mentioned herein, respondent has been, and is now, in substantial competition in or affecting commerce with corporations, firms, and individuals engaged in the similar business of publishing, distributing, offering for sale, and selling magazines.

PAR. 10. The aforesaid acts and practices of respondent, through its CBS Consumer Publishing Division, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors, and constituted unfair methods of competition and unfair and deceptive acts and practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Cleveland Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent CBS Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 51 West 52nd St., in the City of New York, State of New York, and one of its components is the CBS Publishing Group.

CBS Consumer Publishing Division, a division of the CBS Publishing Group, with its principal office and place of business located at 600 Third Ave., New York, New York, is engaged in the manufacture, distribution, and sale of consumer publications, including magazines.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondent CBS Inc., a corporation, its succes-

sors and assigns, and respondent's agents, representatives, and employees, directly or through the CBS Consumer Publishing Division, or any other corporation, subsidiary, division, or other device in connection with the advertising, publishing, distributing, offering for sale, or selling of magazines in commerce or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do continue to, and forthwith, cease and desist from:

A. Mailing, or causing to be mailed, magazines without the prior expressed request or consent of the recipient.

B. Mailing, or causing to be mailed, a bill to recipients of magazines mailed without the recipient's prior expressed request or consent.

C. Mailing, or causing to be mailed, collection letters to recipients of magazines mailed without the recipient's prior expressed request or consent.

D. Transferring, or causing to be transferred, the alleged delinquent accounts of recipients of magazines mailed without the recipient's prior expressed request or consent, to a debt collection or consumer reporting agency.

Provided, that respondent may act in accordance with the exceptions extended by the Postal Reorganization Act, Section 2, 39 U.S.C. 3009 (1970), as amended or modified.

II

It is further ordered, That respondent CBS Inc., a corporation, its successors and assigns, and respondent's agents, representatives, and employees, directly or through the CBS Consumer Publishing Division, or any other corporation, subsidiary, division, or other device in connection with the collection of consumer debts in commerce or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do continue to, and forthwith, cease and desist from:

A. Using any forms, letters, or materials which represent directly or indirectly, by any means, that where payment due from a consumer in purported receipt of magazines is not received, the information of said delinquency is referred to a debt collection or consumer reporting agency, unless such agency is notified as represented.

B. Misrepresenting, by any means, the manner, extent, and consequences of the referral of debt delinquency information, compiled as a result of the purported receipt of magazines, to debt collection or consumer reporting departments or agencies.

C. Misrepresenting, by any means, that failure to pay the alleged

debt or delinquency, as a result of the purported receipt of magazines, will result in the consumer's credit rating being adversely affected.

D. Misrepresenting, in any manner, the names, roles, functions, relationship to respondent, or titles of individuals who are engaged in the collection of money purportedly due and payable as a result of the purported receipt of magazines, or who transfer information regarding particular consumers to debt collection or consumer reporting departments or agencies as a result of money purportedly due and payable as a result of the purported receipt of magazines.

III

It is further ordered, That:

A. Respondent deliver a copy of this order to each of its present and future operating groups, magazine publishers, and employees directly responsible for magazine circulation marketing activities, and to each of its present and future independent contractors engaged in magazine subscription fulfillment activities or magazine subscription advertising activities.

B. Respondent, through its CBS Consumer Publishing Division, institute a program of continuing surveillance adequate to reveal whether the business practices of individuals or entities described in Section III, paragraph A, conform to the requirements of this order.

C. Respondent, through its CBS Consumer Publishing Division, maintain files containing all inquiries or complaints from any source relating to acts or practices prohibited by this order, for a period of two years after their receipt, and that such files be made available for inspection and copying by the Federal Trade Commission or its staff upon request.

IV

It is further ordered, That:

A. Respondent CBS Inc., through its CBS Consumer Publishing Division, shall offer a choice, at the option of the consumer, of full restitution ($2.98) or a free one (1) year subscription to *Field & Stream* magazine to any consumer who paid in full for an unordered subscription to *Field & Stream* magazine in connection with the *Field & Stream* Sweepstakes/Subscription promotion conducted in late 1974 and early 1975, after the receipt by such consumer of the letter signed by Ken Edwards or Vince Dema, which letter stated in part:

> Dear Friend,
>
> When you sent us your FIELD & STREAM subscription order I accepted it in good faith, and billed you as you requested.

Since that time I've sent you three action-packed issues of FIELD & STREAM, but have not received your payment. You are long overdue. . . .

This offer of full restitution or a free one (1) year subscription shall be made in the following manner:

(1) Within thirty (30) days after the date this order becomes final, respondent, through its CBS Consumer Publishing Division, shall identify all consumers described in Section IV, paragraph A.

(2) Within sixty (60) days after the date this order becomes final, respondent, through its CBS Consumer Publishing Division, shall notify in writing by first-class, post-paid mail, all consumers identified in Section IV, paragraph A(1), at their last known addresses, of their right to restitution in the language, manner, and form shown in Appendix A.

(3) The letter set forth in Appendix A shall request a response to respondent's offer by a certain date. Such date shall be at least one hundred twenty (120) days after the date this order becomes final. Any response to such offer postmarked after such date shall be null and void.

(4) Within one hundred fifty (150) days after the date this order becomes final, respondent, through its CBS Consumer Publishing Division, will, in accordance with consumers' replies to Appendix A, either refund, by first-class, post-paid mail, all monies paid by consumers identified in Section IV, paragraph A(1), or initiate, in accordance with the terms of said letter, a free one (1) year subscription to *Field & Stream* magazine on behalf of said consumer.

(5) Within two hundred ten (210) days after the date this order becomes final, respondent, through its CBS Consumer Publishing Division, will provide to the Commission the following information:

(a) A list of the consumers identified pursuant to Section IV, paragraph A(1), of this agreement.

(b) A list of the consumers to whom letters were sent pursuant to Section IV, paragraph A(2), and which were returned by the United States Postal Service to respondent's CBS Consumer Publishing Division, having been undelivered to consumers.

(c) A list of the consumers who do not return Appendix A or otherwise respond to Appendix A within the time period allowed for such response.

(d) A list of the consumers who elect to receive full two dollars and ninety-eight cents ($2.98) restitution under the terms of the offer extended by Appendix A.

(e) A list of the consumers who elect to receive a free one (1) year subscription to *Field & Stream* magazine under the terms of the offer extended by Appendix A.

B. Respondent, through its CBS Consumer Publishing Division, shall retain in its files for a period of three (3) years after the date that this order becomes final:

(1) All letters and their respective envelopes sent pursuant to Section IV, paragraph A(2), which are returned to respondent's CBS Consumer Publishing Division by the United States Postal Service as undeliverable.

(2) All letters (including those specified by Appendix A) sent to respondent's CBS Consumer Publishing Division by consumers in response to the offer extended by respondent's CBS Consumer Publishing Division pursuant to Section IV, paragraph A.

V

It is further ordered, That, within thirty (30) days after the date this order becomes final, respondent, through its CBS Consumer Publishing Division, shall notify in writing, by first-class mail, in the language, manner, and form shown in Appendix B, those consumers whose names were forwarded by it in respect of *Field & Stream* magazine to Credit Index, a division of Hooper-Holmes.

VI

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth the manner and form in which it has complied with this order.

APPENDIX A

DATE

Name, Address, City, State, ZIP Code.

Re: 1975 World of Leisure Sweepstakes- Field & Stream Magazine.

Dear _____:

Last year, we entered a subscription in your name to *Field & Stream* magazine. If you are dissatisfied with the entry of this subscription and your payment therefor, we would like to make you the following offer:

A cash refund of $2.98 paid; or

A free one-year subscription to *Field & Stream* magazine (newsstand value of $12.00) to begin at once or added at the end of your current subscription.

Please indicate, by checking one box only, which of the above alternatives you desire.

In order to take advantage of this offer, this letter must be postmarked by (*date*). We have enclosed a business reply envelope for your convenience.

Looking forward to hearing from you.

Very truly yours,

CBS Consumer Publishing.

By: _____

APPENDIX B

DATE

Name, Address, City, State, ZIP Code.

Re: 1975 World of Leisure Sweepstakes- Field & Stream Magazine.

Dear _____:

Due to a confusion with respect to an incompletely filled-out sweepstakes entry form/subscription order form, and the resultant billing to you with respect to copies of *Field & Stream* magazine, we referred your name to a direct-mail bad pay file with a consumer credit reporting agency.

Please be advised that we have caused your name to be removed from said file permanently.

By law (Fair Credit Reporting Act), all debt collection agencies or consumer credit reporting agencies must delete information with regard to this misunderstanding upon presentation of this letter.

Please excuse this misunderstanding, and accept our apology.

Very truly yours,

CBS CONSUMER PUBLISHING.

By: _____

IN THE MATTER OF

CENTRAL CALIFORNIA LETTUCE PRODUCERS COOPERATIVE, ET AL.

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8970. Complaint, June 10, 1974 — Final Order, July 25, 1977

This order dismisses a complaint issued against a Salinas, Calif. nonprofit cooperative and 22 of its members for alleged price-fixing practices in the lettuce market, violative of antitrust law. The Commission ruled that the price-fixing practices were exempt from the antitrust laws, under the Capper-Volstead Act, which permits producers of agricultural products to "act together in association . . . in collectively . . . marketing" their products.

Appearances

For the Commission: *Carl J. Batter, Jr.* and *David B. Loken.*

For the respondents: *Philip C. Olsson* and *James F. Rill, Collier, Shannon, Rill & Edwards,* Washington, D.C., *Andrew Church, Abramson, Church & Stave,* Salinas, California and *Max Thelen Jr., Thelen, Marrin, Johnson & Bridges,* San Francisco, California.

COMPLAINT

[2] Pursuant to the provisions of the Federal Trade Commission Act (Title 15, U.S.C. 41, *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to belive that the parties listed in the caption hereof, and more particularly described and referred to hereinafter, have violated the provisions of Section 5 of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Central California Lettuce Producers Cooperative (hereafter "Central") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Central maintains its home office and principal place of business at 512 Pajaro St., Salinas, California. [3]

PAR. 2. Respondent Admiral Packing Co. (hereafter "Admiral") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Admiral maintains its home office and principal place of business at 495 Brunken Ave., P.O. Box 1089, Salinas, California.

PAR. 3. Albert C. Hansen is an individual doing business as Hansen

Farms (hereafter "Hansen"). Hansen maintains its home office and principal place of business at 1941 Alisal Rd., P.O. Box 269, Salinas, California.

PAR. 4. Respondent California Coastal Farms, Inc. (hereafter "Coastal") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Coastal maintains its home office and principal place of business at 1140 Abbott St., P.O. Box 811, Salinas, California.

PAR. 5. Respondent Carl Joseph Maggio Inc. (hereafter "Maggio") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Maggio maintains its home office and principal place of business at South 1st St. & Lonoak Rd., P.O. Box 536, King City, California.

PAR. 6. Respondent D'Arrigo Bros. Co. of California (hereafter "D'Arrigo") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. D'Arrigo maintains its home office and principal place of business at 706 West Market St., P.O. Box 850, Salinas, California.

PAR. 7. Respondent Eckel Produce Co. (hereafter "Eckel") is a partnership organized, existing and doing business under and by virtue of the laws of the State of California. Eckel maintains its home office and principal place of business at 740 Airport Blvd., P.O. Box 1027, Salinas, California.

PAR. 8. Respondent Green Valley Produce Co-Op (hereafter "Green Valley") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Green Valley maintains its home office and principal place of business at 1148 Abbott St., P.O. Box 2123, Salinas, California. [4]

PAR. 9. Respondent Growers Exchange, Inc. (hereafter "Growers") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Growers maintains its home office and principal place of business at 740 Airport Blvd., P.O. Box 479, Salinas, California.

PAR. 10. Respondent Harden Farms of California (hereafter "Harden") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Harden maintains its home office and principal place of business at 1102 Growers St., P.O. Box 779, Salinas, California.

PAR. 11. Respondent J. R. Norton Co. (hereafter "Norton") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Norton maintains its home office and principal place of business at Front & Gabilan Sts., P.O. Box 5375, Salinas, California.

PAR. 12. Respondent Jack T. Baillie Co., Inc. (hereafter "Baillie") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Baillie maintains its home office and principal place of business at 634 South Sanborn Rd., P.O. Box 268, Salinas, California.

PAR. 13. Respondent Let-Us-Pak is a partnership organized, existing and doing business under and by virtue of the laws of the State of California. Let-Us-Pak maintains its home office and principal place of business at 740 Airport Blvd., P.O. Box 225, Salinas, California.

PAR. 14. Respondent Merit Packing Co. (hereafter "Merit") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Merit maintains its home office and principal place of business at 634 South Sanborn Rd., P.O. Box 1649, Salinas, California.

PAR. 15. Respondent Merrill Farms (hereafter "Merrill") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Merrill maintains its home office and principal place of business at 1067 Merrill St., P.O. Box 659, Salinas, California. [5]

PAR. 16. Respondent Pacific Lettuce (hereafter "Pacific") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Pacific maintains its home office and principal place of business at Rianda & Prader Sts., P.O. Box 534, Salinas, California.

PAR. 17. Respondent R. T. Englund (hereafter "Englund") is a partnership organized, existing and doing business under and by virtue of the laws of the State of California. Englund maintains its home office and principal place of business at 271 Rianda St., P. O. Box 517, Salinas, California.

PAR. 18. Respondent Royal Packing Co. (hereafter "Royal") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Arizona. Royal maintains an office and place of business at 91 Spicer St., P.O. Box 5337, Salinas, California.

PAR. 19. Respondent Salinas Lettuce Farmers Cooperative (hereafter "Salinas Lettuce") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Salinas Lettuce maintains its home office and principal place of business at 624 South Sanborn Rd., P.O. Box 594, Salinas, California.

PAR. 20. Respondent Salinas Marketing Cooperative (hereafter "Salinas Marketing") is a corporation organized, existing and doing

business under and by virtue of the laws of the State of California. Salinas Marketing maintains its home office and principal place of business at 1222 Merrill St., P.O. Box 357, Salinas, California.

PAR. 21. Respondent The Garin Co. (hereafter "Garin") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Garin maintains its home office and principal place of business at 634 South Sanborn Rd., P.O. Box 1731, Salinas, California.

PAR. 22. Respondent United Brands Company (hereafter "United Brands") is a corporation organized, existing and doing business under and by virtue of the [6] laws of the State of New Jersey. United Brands maintains its home office and principal place of business at 245 Park Ave., New York, N.Y. United markets fresh produce, including lettuce, through a wholly-owned subsidiary, Inter Harvest, Inc. whose home office and principal place of business is located at 122 East Alisal St., P.O. Box 2115, Salinas, California.

PAR. 23. Respondent West Coast Farms (hereafter "West Coast") is a partnership organized, existing and doing business under and by virtue of the laws of the State of California. West Coast maintains its home office and principal place of business at 470 West Beach St., P.O. Box 809, Watsonville, California.

PAR. 24. Respondents Admiral, Hansen, California, Maggio, D'Arrigo, Eckel, Green Valley, Growers, Harden, Norton, Baillie, Let-Us-Pak, Merit, Merrill Pacific, Englund, Royal, Salinas Lettuce, Salinas Marketing, Garin, United Brands and West Coast (sometimes referred to as "respondent marketers") market fresh produce, including lettuce, primarily from the growing areas of California and Arizona. The total sales of lettuce by respondent marketers in the Salinas, California area in 1973 was substantial, approximately 20,000,000 cartons. Each respondent marketer is a member of respondent Central.

PAR. 25. In the course and conduct of respondent marketers' business of offering for sale, selling, shipping or causing the shipping of fresh produce, including lettuce, from the State of California to persons, corporations or partnerships located in states other than the State of California, and/or in the maintenance by some respondent marketers of selling offices in both California and Arizona, respondent marketers have been and are now engaged in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 26. Respondent Central is engaged in commerce as "commerce" is defined in the Federal Trade Commission Act by virtue of its functions as the vehicle by which its members fix, control,

establish or maintain the price or price ranges of lettuce which is shipped by respondent's members in interstate commerce.

PAR. 27. Except to the extent that competition has been hampered and restrained by reason of the practices hereinafter described, respondent marketers have been in substantial competition with each other and other marketers of fresh produce, including lettuce. [7]

PAR. 28. Since approximately May of 1972, when respondent Central was incorporated, Central and respondent marketers have engaged in a plan, policy, or course of action, the purpose of which is to fix, control, establish or maintain the prices, or price ranges, or price floors, or price ceilings, at which each respondent marketer offers to sell or sells lettuce.

PAR. 29. In furtherance of the plan, policy, or course of action referred to above, Central and respondent marketers have engaged, among others, in one or more of the following acts or practices, each of which constitutes, in itself, an illegal act or practice:

(a) On or about May, 1973, each respondent marketer agreed in writing to sell lettuce to all customers only at prices within the limits of the ceiling prices and floor prices established on a weekly or daily basis by Central.

(b) Representatives of respondent marketers have met, under the auspices of respondent Central, and have discussed or agreed upon prices, or price ranges, or floor or ceiling prices at which each respondent marketer would sell lettuce to their customers.

(c) Respondent marketers have offered to sell or have sold lettuce to their customers at the prices, or price ranges, or floor or ceiling prices discussed or agreed upon at meetings held under the auspices of respondent Central.

PAR. 30. The above acts and practices have or may have the capacity to unduly hinder, suppress, lessen and eliminate competition between respondent marketers and between respondent marketers and other marketers of lettuce and deprives or may deprive the consuming public of prices determined by free and open competition in the sale of lettuce or other fresh produce and thus constitute unfair methods of competition in commerce and unfair acts and practices in commerce, within the intent and meaning of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY MORTON NEEDELMAN, ADMINISTRATIVE LAW JUDGE

MARCH 13, 1975

[3] 1

STATEMENT OF THE CASE

The Federal Trade Commission issued a complaint on June 10, 1974, charging respondent Central California Lettuce Producers Cooperative (hereinafter "Central"), and its 22 members with a violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) by reason of illegal price-fixing in the sale of lettuce.

Prior to filing an answer, respondents moved to dismiss the complaint on the grounds, first, that Central comes within the antitrust exemption for agricultural cooperatives contained in Section 6 of the Clayton Act, and the Capper-Volstead Act of 1922; and second, that since Central is an exempt cooperative only the Secretary of Agriculture has authority to review its pricing practices. On September 4, 1974, I ruled that the Secretary of Agriculture does not have exclusive jurisdiction and the Federal Trade Commission may properly assert its own jurisdiction to determine all the issues in this case including the very issue of the existence of an antitrust exemption.[1] I said at the time that the exemption issue is so closely intertwined with the merits of the case that a motion to dismiss could not [4] be granted, but I indicated the respondents would be given ample opportunity to present evidence as well as legal argument to show why they are entitled to a Capper-Volstead exemption. Subsequently, I ruled that respondents' motion to dismiss on the grounds of lack of jurisdiction may not be certified to the Commission and respondents were ordered to file an answer.[2]

Respondents' answer dated September 20, 1974, admitted, with certain minor exceptions, the allegations respecting the identity of each of the respondents. The answer also admitted that each of the individual respondents is engaged in commerce as "commerce" is

[1] See, Order Denying Motion to Dismiss and Request for Oral Argument and Setting Date for Filing of Answer (September 4, 1974). Addressing the argument that the Secretary of Agriculture has exclusive or primary jurisdiction over the exemption question, I said that this view has been "unequivocally rejected" by the Supreme Court after "full consideration" was given to the legislative history. *Maryland and Virginia Milk Producers Assn., Inc.* v. *United States*, 362 U.S. 458, at 462-463 (1960); *United States* v. *Borden Co.*, 308 U.S. 188 (1939). In addition, I noted that the plain language of the statute, as well as the legislative history and the decided cases compel the conclusion that the Capper-Volstead Act grants no more than auxiliary power to the Secretary in certain special circumstances, and even if the Secretary should exercise that power, the Commission need not stay its hand. *Washington Crab Assn., et al.*, 66 F.T.C. 45 (1964).

[2] See, Order Denying Respondents' Request for Certification to the Commission pursuant to Section 3.23(b) and Granting Further Time to Answer (September 16, 1974).

defined in the Federal Trade Commission Act by reason of the fact that they all sell lettuce across state lines. All other material allegations of the complaint were denied and respondents again asserted the affirmative defense that the Commission lacked jurisdiction because of the exempt status of Central and its members.[3]

With the joinder of issue, a prehearing conference was held on October 15, 1974. After listening to the arguments of both parties, it appeared to the Administrative Law Judge that the facts of the case could be stipulated and on the basis of that stipulation a decision could be rendered on both the applicability of the Capper-Volstead exemption and whether a substantive antitrust violation had occurred.

[5] The parties agreed to follow this suggested course and on December 11, 1974, a stipulation, with exhibits attached, was filed. Thereafter, on January 20, 1975, motions and briefs and accompanying affidavits in support of summary decision were submitted by both parties; replies were filed on February 21, 1975, and oral argument on the cross-motions was heard on February 27, 1975.

Based on the factual stipulation and exhibits as well as the briefs filed in support of the cross-motions for summary decision, I make the following findings of fact, and conclude that complaint counsel's motion for summary decision should be granted.

II

FINDINGS OF FACT

Central and Its Members

1. This case involves the formation and subsequent pricing activity of Central California Lettuce Producers Cooperative (hereinafter "Central"), an association of 22 lettuce producers located in the Salinas-Watsonville-King City area of California and who, together, account for a significant share of the total production in the United States of this important fresh food. (Finding 37)

2. Central was incorporated on June 8, 1972, as a nonprofit cooperative association without capital stock under the provisions of Chapter 1, Division 20, of the Agricultural Code of California, West's Ann. Agric. Code, §§ 54001, *et seq.* (Stip. ¶¶ 2, 6; Ex. B-1)

3. Central began functioning in May 1973, when it signed an

[3] Another affirmative defense relating to alleged denial of an opportunity to present and discuss offers of settlement as provided by Sections 2.31 and 2.34 of the Commission's Rules and 5 U.S.C. 554 has not been adequately briefed to the Administrative Law Judge to the point where an initial decision can be rendered on this issue. Moreover, the Commission's policy relating to administration of Part 2 of its Rules is not a matter properly before an Administrative Law Judge.

identical "Cooperative Marketing Agreement" (hereinafter "CMA") with each of the following 22 individual respondents named in the complaint: Admiral Packing Company; Albert C. Hansen d/b/a Hansen Farms; California Coastal Farms, Inc.; Carl Joseph Maggio, Inc.; D'Arrigo Bros. Co. of California; Eckel Produce Co.; Green Valley Produce Co-Op; Growers Exchange, Inc.; Harden Farms of California; J. R. Norton Co.; Jack T. Baillie Co., Inc.; Let-Us-Pak; Merit Packing Co.; Merrill Farms; Pacific Lettuce; R. T. Englund Co.; Royal Packing Co.; [6] Salinas Lettuce Farmers Cooperative; Salinas Marketing Cooperative; The Garin Co.; Inter Harvest, Inc., a

subsidiary of United Brands Co.; and West Coast Farms. (Stip. ¶ 1)[4]

[9]

The Production and Marketing of Lettuce[5]

4. The practices of Central and its members, which are the subject of this proceeding, take place in a lettuce industry consisting of growers, grower-shippers, and shippers, as well as brokers and buyers

[4] In the joint answer filed by the 22-member respondents, each admits the complaint allegations respecting corporate identity. Minor errors in the complaint with respect to respondents J. R. Norton Co. and Inter Harvest, Inc. were corrected by stipulation (see, Order Incorporating Stipulation Into Record, March 3, 1975). The corporate identities of the 22 members of Central are as follows:

Respondent Admiral Packing Co. is a California corporation with its home office and principal place of business at 495 Brunken Ave., P.O. Box 1089, Salinas, California.

Albert C. Hansen is an individual doing business as Hansen Farms with its home office and principal place of business at 1941 Alisal Rd., P.O. Box 269, Salinas, California.

Respondent California Coastal Farms, Inc. is a California corporation with its home office and principal place of business at 1140 Abbott St., P.O. Box 811, Salinas, California.

Respondent Carl Joseph Maggio, Inc. is a California corporation with its home office and principal place of business at South 1st St. & Lonoak Rd., P.O. Box 536, King City, California.

Respondent D'Arrigo Bros. Co. of California is a California corporation with its home office and principal place of business at 706 West Market St., P.O. Box 850, Salinas, California.

Respondent Eckel Produce Co. is a California partnership with its home office and principal place of business at 740 Airport Blvd., P.O. Box 1027, Salinas, California.

Respondent Green Valley Produce Co-Op is a California corporation with its home office and principal place of business at 1148 Abbott St., P.O. Box 2123, Salinas, California.

Respondent Growers Exchange, Inc. is a California corporation with its home office and principal place of business at 740 Airport Blvd., P.O. Box 479, Salinas, California.

Respondent Harden Farms of California is a California corporation with its home office and principal place of business at 1102 Growers St, P.O. Box 779, Salinas, California.

Respondent J. R. Norton Co. is an Arizona corporation with its home office and principal place of business at Front & Gabilan Sts., P.O. Box 5375, Salinas, California.

Respondent Jack T. Baillie Co., Inc. is a California corporation with its home office and principal place of business at 634 South Sanborn Rd., P.O. Box 268, Salinas, California.

Respondent Let-Us-Pak is a California partnership with its home office and principal place of business at 740 Airport Blvd., P.O. Box 225, Salinas, California.

Respondent Merit Packing Co. is a California corporation with its home office and principal place of business at 634 South Sanborn Rd., P.O. Box 1649, Salinas, California.

Respondent Merrill Farms is a California corporation with its home office and principal place of business at 1067 Merrill St., P.O. Box 659, Salinas, California.

Respondent Pacific Lettuce is a California corporation with its home office and principal place of business at Rianda & Prader Sts., P.O. Box 534, Salinas, California.

Respondent R. T. Englund is a California partnership with its home office and principal place of business at 271 Rianda St., P.O. Box 517, Salinas, California.

Respondent Royal Packing Co. is an Arizona corporation. Royal maintains an office and place of business at 91 Spicer St., P.O. Box 2337, Salinas, California.

Respondent Salinas Lettuce Farmers Cooperative is a California corporation with its home office and principal place of business at 624 South Sanborn Rd., P.O. Box 594, Salinas, California.

Respondent Salinas Marketing Cooperative is a California corporation with its home office and principal place of business at 1222 Merrill St., P.O. Box 357, Salinas, California.

Respondent The Garin Co. is a California corporation with its home office and principal place of business at 634 South Sanborn, P.O. Box 1731, Salinas, California.

Respondent United Brands Company is a New Jersey corporation with its home office and principal place of business at Prudential Center, Boston, Mass. United Brands markets fresh produce, including lettuce, through a wholly-owned subsidiary, Inter Harvest, Inc., whose home office and principal place of business is located at 122 East Alisal St., P.O. Box 2115, Salinas, California.

Respondent West Coast Farms is a California partnership with its home office and principal place of business at 470 West Beach St., P.O. Box 809, Watsonville, California.

[5] The stipulated facts relating to the lettuce industry are derived from some of the findings on the subject in the Initial Decision in F.T.C. Dkt. No. 8835, *United Brands Company* (Slip Opinion dated March 19, 1973 [83 F.T.C. 1614]).

located at various shipping points. The shipping points change during the year. Starting with spring shipments in May and until October, the Salinas-Watsonville-King City area (Monterey and Santa Cruz Counties, California) furnishes the major share of lettuce. In November, most lettuce comes from Arizona. And from December through March, the major source, again, is California (the Imperial Valley, and, especially in March, the Blythe District of the Imperial Valley). During April, as in November, the largest share comes from Arizona. In addition to these major shipping points, smaller amounts of lettuce come from other areas from time to time. (Stip. ¶ 25(a))

5. Lettuce is a perishable food which means that once it ripens, it must be harvested within three or four days. (Stip. ¶ 25(a))

6. Harvesting decisions are made on a day-to-day basis and depend on such factors as volume shipped and the prices received on the preceding day, information as to the "unloads" and prices in major terminal markets, local weather conditions, weather conditions in terminal markets, and the condition of the crop. (Stip. ¶ 25(a))

7. After the harvesting decision is made, lettuce is cut, packed, and inspected in the field. Lettuce is normally packed 24 heads to a cardboard carton and then trucked to a vacuum cooler, where the temperature is lowered to about 34 degrees. From the vacuum cooler, the cartons are shipped by rail or truck to destinations throughout the United States. Again, because it is a perishable product, it must be shipped on the same day it is cut or, at the latest, the next day. (Stip. ¶ 25(a))

[10] 8. Buyers and buyer representatives may inspect the lettuce at the vacuum cooling plant or in the field. Inspection normally takes place before a final purchase is made. Buyers compare quality as between different grower-shippers or between the lettuce produced in different fields but handled by the same shipper or grower-shipper. Quality is an important factor in pricing and accounts in significant measure for the range of lettuce prices at each shipping point. (Stip. ¶ 25(a))

9. Most lettuce is shipped "naked" in the carton; that is, the heads are not individually wrapped. The clear plastic film in which lettuce is sometimes displayed in retail stores is ordinarily added by the store after the lettuce head is cut and trimmed of any discoloration that may have taken place in transit. While lettuce, both wrapped and unwrapped, is not advertised to consumers on a brand basis, individual label names are used by growers and certain labels have achieved some measure of trade recognition for quality. (Stip. ¶ 25(a); Affidavit of John Derdivanis, January 15, 1975, attached to Respon-

dents' Memorandum in Support of Motion For Summary Decision, January 20, 1975.)

10. Growers, grower-shippers, and shippers keep abreast of the market by contacts with one another and through the services offered by the Federal-State Market News Service. By personal contact, and by telephone, and by following the publications of the Federal-State Market News Service, both sellers and buyers have available the latest information relating to the price and the volume of lettuce being sold. This includes information on "unloads" and prices in terminal markets, on weather conditions in these markets, as well as in other producing areas; the shipping volume and price for the preceding day; and also the current day's volume and pricing. Market News reporters seek and disseminate information on both the selling and buying side of the market. This is done through contacts with shippers and with purchasers. This information is verified and published the following day. (Stip. ¶ 25(a))

[11] 11. As indicated in Finding 6, lettuce is sold on a day-to-day basis. Negotiations over any particular sale begin in the morning and terminate in the afternoon after each party has had the opportunity of informing himself fully on the day's market, both through the Market News Service and by contact with the trade. The buyers are represented by brokers or by their own representatives. (Stip. ¶ 25(a))

12. Most lettuce is sold f.o.b. at the shipping point. However, some lettuce is sold on a consignment basis. This usually represents an established relationship between a particular terminal market wholesaler and grower-shipper with a consequent sharing of the profits or losses involved in resale at the terminal market. (Stip. ¶ 25(a))

13. At times, consignments are made on a distress basis — that is, cars that could not be sold at the shipping point are consigned to a wholesaler or another representative who will undertake to sell the contents at the terminal market for the best price he can get. In other words, the car has a "home," where a designated representative will undertake to sell it. (Stip. ¶ 25(a))

14. In the absence of either a shipping point sale or a consignment, a grower-shipper may "roll" the car and endeavor to sell it while it is en route toward Eastern markets. Otherwise, he may "no-bill" the car — that is, provide no bill of lading for that day but hold the car over for another day for possible sale or consignment at that time. (Stip. ¶ 25(a))

15. To the extent that there exists any substantial volume of no-bills, rollers, and distress consignments, this tends to depress the market since such cars are surplus at the going prices. (Stip. ¶ 25(a))

16. The lettuce industry often will be faced with average annual prices over a two or three-year period which do not cover total costs of production and harvesting. For this reason, well-established grower-shippers and shippers plan their schedules and evaluate financial performance over relatively long periods of operations [12] of up to four to five years, with the expectancy that losses in one year will be offset by gains in others. As would be expected, successful shippers and grower-shippers require sufficient cash reserves to carry them through possible years of low return. (Stip. ¶ 25(a))

17. Traditionally, the industry has been characterized by considerable price uncertainty. Because of the perishable character of lettuce and the huge volumes that must be moved to market in a brief period of time, supplies are highly variable, not only from area to area and from season to season, but also from year to year. Both the vagaries of weather and the uncoordinated production of many growers may result in sudden shortages or unanticipated surpluses. (Stip. ¶ 25(c))

18. Lettuce is subject to an inelastic demand curve. This means that a small change in quantity will generate an opposite but relatively larger change in the prevailing market price. If shipments are reduced by a given percentage, there is an opposite and more than proportional increase in price resulting in greater total grower-shipper returns. On the other hand, if shipments are increased by given percentage, there is an opposite and more than proportional decrease in price, with a resultant decrease in total revenue for the industry. (Stip. ¶ 25(c))

19. With the industry subject to so many variables on both the supply side and the demand side, prices tend to fluctuate widely and wildly. Prices may drop or rise by as much as 300 percent in a week — from $5.50 to $1.50, or the converse. (Stip. ¶ 25(d))

The Activities of Central

20. Against this background of perishability of product, price uncertainties, demand inelasticities, as well as a history of distress selling, Central was created. Its purpose, as indicated in the preface to the CMA which was signed with the 22 members (Finding 3), is as follows:

> [13] WHEREAS, it is the objective of the Cooperative [*i.e.*, Central] to improve conditions in the produce industry for the mutual benefit of its members as producers by promoting, fostering, and encouraging the intelligent and orderly marketing of agricultural products through cooperation; eliminating speculation and waste; making the distribution of agricultural products between producers and consumers as direct as can be efficiently done; stabilizing the marketing of

agricultural products; encouraging efficiency and economy in marketing; preventing the demoralizing of markets resulting from dumping and predatory practices; mitigating the recognized evils of a marketing system under which prices are set for the entire industry by the weakest producer; and fostering the ability of the members of the Cooperative to obtain prices for their products, in competitive markets, which are fair prices but not prices inflated beyond the reasonable value of such products by reason of artificially created scarcity of such products or other predatory trade practices which would injure the public interest; and

WHEREAS, the objective can be achieved only if supported by mutual cooperative effort of all the members on a relatively permanent basis, and this agreement is one of a series of contracts with the members evidencing such cooperative effort. (Stip. ¶ 1; Ex. A, p. 1)

21. The CMA in effect between Central and each of its members during the 1973 and 1974 Salinas-Watsonville-King City lettuce season had a three-year term, but the producers' obligations thereunder are limited to the actual Salinas-Watsonville-King City season. Moreover, the CMA may be terminated by a member upon 31 days notice. (Stip. ¶ 1; Ex. A, pp. 1,7)

22. While each of the 22 members of Central is a producer of lettuce, Central, itself, does not grow or harvest or ship lettuce in its own name. Central does not negotiate directly with buyers of lettuce, and does not enter into direct agreements with buyers for the sale [14] or shipment of specific lots of lettuce. Central does not employ any sales personnel in its own name and has no receipts from sales of lettuce. (Stip. ¶¶ 9, 19, 22)

23. Central's income comes from membership fees and assessments. Each member pays a membership fee in the same amount as every other member. Assessments were paid during the 1973 season at the rate of $500 per member and during the 1974 season at the rate of $0.002 per carton shipped. Central has never made any distribution of its income to its members. (Stip. ¶ 20)

24. Each individual member of Central or his individual agent, arranges or negotiates with buyers for the sale of lettuce produced by or for him during the Salinas-Watsonville-King City season. Members compete with each other for the same customers. Payment for such lettuce is billed and collected by the individual member or its individual agent for its own account. At all times the individual members deal with lettuce buyers under their individual trade names. The member's affiliation with Central is disclosed by imprinting the organization's name or logo on shipping boxes. (Stip. ¶¶ 22, 24)

25. Paragraph 2 of the CMA imposes the following obligations on each member (*i.e.*, "Producer"):

A. *Cooperative Marketing.* Producer agrees to handle and market

all lettuce grown or harvested by or for Producer during the term of this agreement, whether on land owned by or rented to Producer or otherwise, only through the Cooperative [*i.e.,* Central] and under its auspices and pursuant to the terms and conditions of this agreement.

B. *Crop Reports.* Producer agrees to report to the Cooperative and keep the Cooperative advised at all times of the actual and expected status of all crops of lettuce under Producer's control. Such reports shall include, but not be limited to, the number of acres and types of lettuce planted, date of planting, expected yields of each lot, and expected dates of harvest, relating to the harvesting, packing, shipping, and/or marketing of such lettuce. Reports of planting shall be rendered [15] within one month after planting has been completed in each lot. Reports of expected yields and harvest dates shall be rendered weekly, or at such other intervals as the Cooperative may establish, with each report to contain a breakdown to daily estimates.

C. *Cooperative Schedules.* Producer agrees to abide by the harvesting, processing, packing and shipping schedules, and other requirements established by the Cooperative. Volume controls may not be imposed by the Cooperative unless approved by a unanimous vote of all those members in attendance at a meeting called to consider such controls after giving actual notice of the time, place and purpose of such meeting to all members, either in person, by phone, or by delivery of written notice, at least 24 hours in advance of such meeting.

D. *Inspection.* Producer agrees to permit official representatives of the Cooperative to enter Producer's fields, sheds and other facilities to inspect the condition, quality and quantity of growing and harvested crops.

E. *Brokerage.* Producer agrees to make no discounts or concessions in lieu of brokerage. Any brokerage paid shall be shown on the invoices to all parties.

F. *Prices.* Producer agrees to sell lettuce to all customers only at prices within the limits of the ceiling prices and floor prices established on a weekly or daily basis by the Cooperative.

G. *Shipping Terms.* Producer agrees to sell lettuce to all customers on only the terms authorized by the Cooperative, and those terms shall be F.O.B., F.O.B.A., F.O.B.A.F. No Recourse, Joint Account, Guarantee Consignment, and Open Consignment, except for Government buying, which shall be D.S.A., if required. Producer agrees to make no sales on terms better than "Good Delivery Standards as set forth for produce under P.A.C.A. Rules & Regulations, under a 'No grade' contract."

H. *No Market Protection.* Producer agrees to eliminate market protection at the time of transaction.

I. *No Unsold Rollers.* Producer agrees not to roll any lettuce unless and until it has been sold or consigned.

[16] J. *Canadian Sales.* Producer agrees that on all sales to Canada, the costs of inspection and inspection services wires are to be paid by the receiver or buyer.

K. *Delinquent Accounts Report.* Producer agrees to submit to the Cooperative on Monday of each week during the season a list of all accounts over 30 days old from date of shipment, listing customers, amounts in arrears, and age of accounts.

L. *Chronic Complainers Report.* Producer agrees to submit to the Cooperative on Monday of each week the names of receivers and buyers who have become habitual and chronic complainers about grade, quality and/or condition of produce received by them from Producer.

M. *Accounts and Records.* Producer agrees to make available to the Cooperative for inspection and copying all sales confirmation documents for each and every sale of lettuce made by Producer during the term of this contract, whether or not such sale has been in compliance with the schedules and requirements established as provided herein. Producer agrees that all books of accounts and records relating to the sale of crops during the term of this contract shall be open to inspection by Cooperative at reasonable times during business hours and for a period not exceeding three years following any transaction. Producer shall not be obligated by this contract to keep or retain any of his records more than three years following the consummation of any given transaction during the term of this contract. (Stip. ¶ 1, Ex. A, pp. 1-3)

26. The obligations of Central are set forth in paragraph 3 of the CMA. One such obligation is to set up a committee or committees, and through such committee or committees to "establish for its membership . . . such schedules and requirements for harvesting, processing, packing, shipping, grading, quality control, marketing and pricing of lettuce as shall be considered necessary by the Cooperative [Central] to achieve the objectives set forth in the preamble to this Cooperative Marketing Contract." (Stip. ¶ 1; Ex. A, pp. 3-4)

[17] 27. In addition, the CMA provides that a committee of committees is to meet weekly or more often if necessary. Decisions are to be by majority vote, Central is to provide proper notice of meetings, and give equitable treatment to all members (Stip. ¶ 1; Ex. A, pp. 3, *et seq.*), and

acquire, exchange, interpret, and disseminate past, present and prospective crop, market, statistical, economic and similar information to and for the benefit of its membership, including Producer hereunder. Such information shall include information relating to complaints, rejections, sales and purchasing practices and credit of brokers, commission merchants, receivers and purchasers. (Stip. ¶ 1; Ex. A, p. 3 (CMA Para. 3(E)))

28. Pursuant to by-laws adopted subsequent to the formation of the cooperative, each member of Central had a seat on the Board of Directors and a seat on the Executive Committee of Central. During 1973 and 1974, each respondent member had a seat on the Board of Directors and a seat on the Executive Committee of Central. (Stip. ¶ 8; see, Tr. 17-19 (Feb. 27, 1975))

29. Central's Executive Committee meets weekly or more often and reviews the various factors affecting the overall supply and demand for lettuce and determines a ceiling price, a floor price, or both, for future sales of lettuce by its members. (Stip. ¶ 6)

30. The organization and activity of Central is further described in a series of "messages" which Central caused to be published in *The Packer,* a trade publication which is the national newspaper of the fresh fruit and vegetable industry. (Stip. ¶ 12)

31. The "message" of June 16, 1973, described how the members of the Executive Committee meet at least once a week, how each member provides information on his acreage, plantings, expected yields, and estimated shipments for the following week. The Committee takes into account estimated shipments of nonmembers, and from other shipping points, as well as marketplace conditions. Then, the Committee fixes a ceiling or floor, or both on the price of lettuce. Thus, according to the June 16, 1973 "message" —

[18] Accurate information is the key ingredient in any successful marketing program. The marketing agreement signed by the 22 lettuce producing members of the Central California Lettuce Producers Cooperative recognizes its importance.

At least once each week, the Co-op members gather as a committee of the whole to present current crop reports. Each member reports the actual and expected status of all lettuce crops under his control for the coming period, usually one week.

These reports include the number of acres and type of lettuce planted, date of planting, expected yields of each lot and expected dates of harvest. It is interesting that for the week June 4-8 the production estimated by the members a week ahead of harvest was for 1.326 carlot equivalents. The actual total packed was 1.352 carlot equivalents. We think this is very accurate forecasting in a crop prone to such sizeable fluctuations due to weather.

The committee of the whole also takes into consideration what amounts of lettuce can be expected from producing areas other than the Salinas-Watsonville-King City district, the amounts expected from S-W-K.C., shippers not participat-

ing in the Co-op and conditions in the marketplace that will have a bearing on demand.

Working with accurate production information provides the basis for an open debate by Co-op members. With 22 separate members and 22 separate points of view, debate is assured. Every member can and does express his view en route to a consensus opinion.

With the production information firmly in hand, members then seek to arrive at an equitable range of prices that will result in an orderly flow of lettuce to market during the coming week.

[19] Section F of the marketing agreement states the "producer agrees to sell lettuce to all customers only at prices established on a weekly or daily basis by the cooperative."

To date, the Co-op has suggested only ceiling prices above which sales by members were prohibited. Tight supplies to date have made suggested price floors unnecessary.

The agreement also provides for inspection of members' fields should it be necessary to insure the accuracy of a members' crop estimate.

By arriving at a price range on a factual basis, the Co-op makes it possible for its members' customers to enjoy a new confidence in the supply and price quotations. It also insures our members a fair return within the dictates of supply and demand. It is, we submit, orderly marketing in action. (Stip. ¶ 12; Ex. C, p. 2)

32. The June 23 "message" dealt with "Good Delivery Standards, Shipping Terms Defined." Paragraph 2 of the CMA was quoted in full, and the message interpreted it as follows:

Not authorized and therefore forbidden are delivered sales, price arrival, and F.O.B. Inspection and Acceptance on Arrival. Specifically forbidden under Section I of the agreement are unsold rollers.

Those practices not authorized in the agreement are forbidden on the grounds that lettuce sales on those terms are not conducive to orderly marketing. (Stip. ¶ 12; Ex. C, p. 3)

33. The "message" in the August 18 *Packer* was entitled, "1973 a Year of Steep Union Wage Increases in Salinas." It dealt in particular with the week of August 6:

[20] The Central California Lettuce Producers Co-op has experienced a good deal of success in promoting orderly marketing during the 1973 season at price levels fair to both shippers and receivers in view of lighter than normal supplies. Yet it was not entirely the Co-op's activity that was responsible for lettuce pricing the week of August 6 — a week that may be looked back upon as the time that $1.25 lettuce became obsolete.

Getting back into action after a 19-day strike by Teamster Union Local 890, a huge glut of supplies developed the week of August 6 as growers and shippers tried to salvage fields past the peak of maturity in addition to lettuce scheduled for that date. The remarkable factor was that prices did not generally go below the $1.75 mark — $.50 higher than the normal rock-bottom distress price.

* * * * * * *

With the heavy cost increases of labor, packaging supplies, and other inputs in

1973, it seems likely that $1.75 may be the lowest price at which growers will harvest and pack in time of burdensome supply. (Stip. ¶ 12; Ex. C, p. 10)

34. In addition to the "messages" the day-to-day operations of the cooperative are further reflected in the minutes of the weekly, or more frequent meetings, at which members of the Executive Committee of Central discuss prices and sometimes other terms and conditions of sale. These "minutes" are usually the handwritten notes kept by the chairman. (Stip. ¶ 13)

35. The "minutes" which are in the record show that during 1973 the Executive Committee took the following actions to establish ceiling prices: [21]

May 9, 1973	$6.00 ceiling	in effect May 9-12
May 11, 1973	$6.00 ceiling	in effect until May 18
May 25, 1973	$7.00 ceiling	in effect May 28-June 1
May 30, 1973	$7.00 ceiling	in effect through June 6
August 3, 1973	$5.00 ceiling	in effect until August 8
August 29, 1973	$2.75 ceiling	in effect until September 1
August 31, 1973	$3.00 ceiling	in effect until September 5
September 5, 1973	$3.00 ceiling	in effect September 6-12
September 12, 1973	$3.00 ceiling	in effect September 13-19

(Stip. ¶13; Ex. D, pp.3, 6, 8, 10, 24, 30, 31, 32, 35)

36. The "minutes" of the Executive Committee meetings for 1973 reflect only one decision to establish a price range. At the meeting of August 6, 1973, the Executive Committee voted to establish a maximum price of $2.50 and a minimum price of $1.75 to remain in effect until August 10. (Stip. ¶ 13; Ex. D, p. 25)

37. During 1973, the 22 members of Central shipped over 20 million cartons or over 60 percent of the lettuce originating from the Salinas-Watsonville-King City shipping point. During calendar year 1973, approximately 77,678,000 cartons of lettuce were shipped from all California areas during all seasons and total U.S. shipments covering all U.S. areas and seasons were approximately 110,622,000 cartons. (Stip. ¶ 23)

38. The lettuce produced by the 22 members of Central is shipped

in interstate commerce generally, on a day-to-day basis, from approximately mid-April to mid-October (the Salinas-Watsonville-King City season). (Stip. ¶ 10)

39. All 22 respondent members of Central sold lettuce pursuant to the policies of Central as set forth in Sections 2E to 2J of the CMA and as further implemented by votes of the Executive Committee. (See, Finding 25; Stip. ¶ 18; Ex. A, pp. 2-3) [22]

III

DISCUSSION

This case has been submitted on cross-motions for summary decision under Section 3.24 of the Commission's Rules. All of the major facts have been stipulated, and complaint counsel do not contest certain additional facts as stated in two supporting affidavits filed by respondents. Since there is no dispute as to any material question of fact, I have decided, as a matter of law, that summary decision sustaining the complaint is justified.[6]

The case involves the scope of the so-called agricultural cooperative exemption as it applies to the 22 lettuce growers who, during 1973 and 1974, made up the Central California Lettuce Producers Cooperative (Central).

The exemption derives, initially, from Section 6 of the Clayton Act, which states that nothing in the antitrust laws shall "forbid the existence and operation of * * * agricultural or horticultural organizations, instituted for * * * mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof." Section 6 of the Clayton Act further provides that neither such organizations nor tneir members "shall be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws."[7] By its terms, the Section 6 exemption applies only to cooperatives "not having capital stock"; this limitation, however, was removed by enactment of the Capper-Volstead Act of 1922.[8]

[23] Section 1 of Capper-Volstead allows agricultural producers to "act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market,

[6] The Supreme Court has said that antitrust cases usually are not susceptible to disposition by summary judgment under Rule 56 of the Federal Rules of Civil Procedure, *Poller* v. *Columbia Broadcasting System Inc.*, 368 U.S. 464 (1962); there is no reason, however, for denying summary decision in an antitrust case where the main facts have been stipulated, and particularly, where the controlling issue is one of jurisdiction. See, Gellhorn and Robinson, *Summary Judgment In Administrative Adjudication*, 84 Harv. L. Rev. 612, 626-628 (1971).

[7] 38 Stat. 731 (1914), 15 U.S.C. 17.

[8] 42 Stat. 388 (1922), 7 U.S.C. 291-292.

handling, and marketing" their products. Section 1 also provides that "Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes . . . ." Section 2 of the Act authorizes the Secretary of Agriculture to issue cease and desist orders if he finds that a cooperative monopolizes or restrains trade "to such an extent that the price of any agricultural product is unduly enhanced by reason thereof."

Central is not a stock corporation,[9] and respondents claim the agricultural exemptions under both the Clayton Act and the Capper-Volstead Act.[10] While the right of farmers to organize into cooperatives derives from both Acts, it has been held that Capper-Volstead clarifies the exemption,[11] and a specific practice must be sanctioned by Capper-Volstead since the "full effect" of the Clayton Act is to allow the creation of an agricultural cooperative without triggering the antitrust laws by reason of the mere existence of the cooperative.[12] [24] Therefore, in resolving the ultimate issue in this case — whether Central was legally engaged in "collectively marketing" as that term is used in Capper-Volstead or engaged in illegal price-fixing — I assume that the latter is not a "legitimate object" of Clayton 6, while the former is. In short, the Clayton Act adds no additional substantive breath to the claimed exemption, and respondents' cause must rise or fall with the Capper-Volstead Act.

In this case the Capper-Volstead exemption is claimed by 22 lettuce growers in the Salinas-Watsonville-King City area who created Central because they were concerned about certain industry conditions and competitive practices which tended to depress prices.[13] Dealing with a highly perishable commodity which had to be harvested within three or four days after it ripens, and is usually sold on the same day as it is harvested, lettuce was being marketed by some growers at distress prices while other growers were consigning lettuce to Eastern markets in the form of so-called "unsold rollers."[14] The existence of such surplus lettuce had the effect of bringing prices down to the point that the industry as a whole operated at a loss for periods of two years or more.[15] The stipulation describes the background of Central as follows:

> To the extent that there exists any substantial volume of no-bills, rollers, and

[9] Finding 2.

[10] As well as the Cooperative Marketing Act of 1926, see Footnote 24, *infra*.

[11] *Case-Swayne Co., Inc.* v. *Sunkist Growers, Inc.*, 389 U.S. 384 (1967). See also, *Sunkist* v. *Winckler & Smith Co.*, 370 U.S. 19 at 28 (1962) ("The Capper-Volstead Act set out this immunity [*i.e.*, Clayton 6] in greater specificity").

[12] *Maryland and Virginia Milk Producers Assn.* v. *United States*, 362 U.S. 458, 465-466 (1960).

[13] Findings 4 to 20.

[14] Findings 5, 6, 7, 11, 13, 14, 15, 20.

[15] Findings 15, 16.

distress consignments, this tends to depress the market since such consignments are surplus at the going prices.[16]

* * * * * * *

Traditionally, the industry has been characterized by considerable price uncertainty. Because of the perishable character of lettuce and the huge volumes that must be moved to market in a brief period of time. Supplies are highly variable, not only from area to area and from season to season, but also from year to year. Both the [25] vagaries of weather and the uncoordinated production of many growers may result in sudden shortages or unanticipated surpluses.[17]

* * * * * * *

With the industry subject to so many variables on both the supply side and the demand side, prices tend to fluctuate widely and wildly. Prices may drop or rise by as much as 300% in a weekly time — from $5.50 to $1.50 or the converse.[18]

The stipulation also shows that some producers, by reason of long-range corporate planning, were able to overcome the financial strain of short-term price uncertainty but others, apparently, were not.[19] And obviously, *all* would have preferred not to have to confront competitive conditions which tend to depress prices. Taking what Central actually did (eliminate "rollers," and set a range of prices or a ceiling price)[20] and in the light of the background described above, a fair conclusion from the stipulation is that Central was put together mainly to stop distress selling, to get higher prices, and thereby to improve profits; its members assuming that regulation of pricing and elimination of price cutting in order to accomplish these ends was permissible conduct under the limited antitrust exemption recognized by the Capper-Volstead Act. Unquestionably, if there is no exemption in this case, the members and Central are guilty of illegal price-fixing under *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

To qualify for the exemption, an agricultural cooperative must meet the following structural requirements: (1) It must be an association of agricultural producers — *i.e.*, actual farmers, not middlemen; (2) It must operate on a nonprofit basis; (3) It must [26] operate for the mutual benefit of its members; (4) It must not deal in a greater dollar volume of nonmembers' products than the value of products handled by it for members; (5) It must conduct its business either on a one member, one vote basis, or not pay dividends on capital in excess of 8 percent per year.

[16] Finding 15.
[17] Finding 17.
[18] Finding 19.
[19] Finding 16.
[20] Findings 25, 29, 31, 32, 33, 35, 36, 39.

Complaint counsel do not challenge the organizational basis of Central, and I conclude that Central did, indeed, meet all structural requirements.[21] But consideration of the Capper-Volstead Act exemption only begins with these conditions. Before the exemption can be claimed, it must be shown that the cooperative was engaged in "*collectively* processing, preparing for market, handling and *marketing* in interstate and foreign commerce, such products of persons so engaged [*i.e.*, the products of the farmer members]."

Respondents contend that given the fact that Central was properly organized, they come within the Capper-Volstead exemption because the weekly meeting for the purpose of setting a ceiling price or a range of prices or to eliminate "distress" practices is a proper collective marketing function of a legitimately structured Capper-Volstead cooperative. Complaint counsel, on the other hand, say that there is no exemption because Central does not engage in any legitimate form of collective marketing and, therefore, the meetings constituted illegal price fixing.

The meaning of the term "collectively marketing" is the key issue here because clearly Central does not perform any of the *other* legitimate functions of a Capper-Volstead cooperative; that is, it does no collective "processing," "preparing for market," or "handling." By this I mean, that Central does not negotiate with buyers of lettuce nor does it enter into agreements with buyers of lettuce for the sale or shipment of produce.[22] Central does not employ any sales personnel in its own name nor does it have receipts from the sale of lettuce. Central does not grow, harvest, or ship lettuce in its own name.[23] [27] All that Central does, that is of any significance to this case, is to serve as a meeting ground for the lettuce producers to come together and agree on pricing policy.[24] After these price discussions, and on the basis of the pricing policies established at the meetings, each individual member of Central negotiates with buyers for the sale of the lettuce produced by it.[25] Payment for the lettuce is billed and collected by the individual member for its own account.[26] Given these facts, as I indicated above, the area of dispute in this case is whether

[21] See also, Findings 22, 27.

[22] Finding 22.

[23] Finding 22.

[24] Central carries out some informational and educational functions, but these are clearly secondary to its main pricing function. Moreover, the stipulation shows that even prior to the formation of Central there was no shortage of accurate information available on all aspects of lettuce growing and marketing (Finding 10). I am willing to assume, however, that whatever Central did in a purely educational or informational vein was sanctioned by the Cooperative Marketing Act of 1926, 44 Stat. 803, 7 U.S.C. 455, *et seq.*, which provides that agricultural producers and their associations may acquire and exchange "past, present and prospective crop, market, statistical, economic, and other similar information" directly or through an agent. By its terms, an act which allows the exchange of information so that farmers can compete more effectively, does not sanction a price-fixing agreement.

[25] Finding 24.

[26] Finding 24.

Central engages in the *kind* of activity which comes within the meaning of the Capper-Volstead term "collectively marketing."

[28] The meaning of "collectively marketing" in an agricultural cooperative context was recently treated at length in *Treasure Valley Potato Bargaining Association* v. *Ore-Ida Foods, Inc.*, 497 F.2d 203 (9th Cir. 1974), *rev. denied* by Supreme Court, 43 Law Week 3274 (reported, 11-12-74). There the argument was made that "bargaining associations" had no antitrust exemption because they did not sell the potatoes grown by the members and, therefore, they did not "collectively market." The Court of Appeals rejected this argument and upheld the exemption claim on the grounds that the cooperatives were indeed "marketing." The Circuit Court said:

> The two associations were in fact "bargaining" associations. They were named "Malheur Potato *Bargaining* Association" and "Treasure Valley Potato *Bargaining* Association." (Emphasis added.) Their principal function was to bargain collectively for their respective members as to prices, terms and conditions of preseason potato contracts. They "coordinated their bargaining efforts" and tacitly attempted to secure similar contracts from both associations so that their members would be treated similarly regardless of the defendant-processor to whom they sold their potatoes.
>
> True, the associations did not collectively *process, prepare for market, handle* or actually sell potatoes. But Section 1 of the Capper-Volstead Act further authorizes "Persons engaged in the production of agricultural products as farmers . . . [to] act together in associations . . . in collectively . . . *marketing* in interstate and foreign commerce, such products of persons so engaged . . . and have marketing agencies in common; . . . ."
>
> The activities of the two associations came within the word *marketing.* Each association acted and bargained for its members in negotiating contracts for the sale of potatoes by its members. [29] It was such bargaining activity, and particularly the practice of one association following the lead of the other, and attempting to secure for its members the same price obtained by the other association in its first contract with Ore-Ida and Simplot, that was the basis for defendants' (cross-appellants') contention of antitrust violations.
>
> We think the term *marketing* is far broader than the word *sell.* A common definition of "marketing" is this: "The aggregate of functions involved in transferring title and in moving goods from producer to consumer, including *among others* buying, selling, storing, transporting, standardizing, financing, risk bearing, and *supplying market information.*" *Webster's New Collegiate Dictionary,* 1953 Edition. [Emphasis added.] The associations here were engaged in bargaining for the sales to be made by their individual members. This necessarily requires supplying market information and performing other acts that are part of the aggregate of functions involved in the transferring of title to the potatoes. The associations were thus clearly performing "marketing" functions within the plain meaning of the term. We see no reason to give that word a special meaning within the context of the Capper-Volstead Act.[37]

[37] 497 F.2d 203, at 215 (all emphasis supplied by Court). There is a separate question in *Treasure Valley* of the legality of an inter-cooperative agreement (*i.e., between* Malheur and Treasure). The court disposed of that issue by saying that since Capper-Volstead allows *associations* to have common marketing agencies, it follows that *without*

(Continued)

[30] *Treasure Valley* held that a bargaining cooperative need not sell the produce of its members, but there was no issue there whether a *mere* agreement about prices without *any* other cooperative activity (*i.e.*, not even collective "bargaining") vis-a-vis the "outside world" is "collectively marketing" within the statutory meaning. Consequently, I believe that *Treasure Valley* left open the question of whether there is a real distinction between (a) the cooperative that bargains with buyers for a price for its members (undoubtedly on the basis of discussions amongst the members about a desirable selling price) and (b) a cooperative which serves as a forum for the members to agree on prices and then lets its members do the actual selling, as in the instant case.

In dealing with the problem of whether the policy behind the exemption logically compels a distinction between these two ways of doing business, I start with the proposition that Capper-Volstead, like any other limited antitrust exemption, is to be construed in the light of the national economic policy as reflected in the antitrust laws. With respect to this policy, the Supreme Court has said:

> [The antitrust laws were] designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. . . . [They] rest on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.[28]

When it is said, therefore, that exemptions like Capper-Volstead are to be *narrowly* read, this means that every effort must be made to harmonize the exemption with the basic national economic policy of encouraging "interaction of competitive forces." Precedent indicates that this standard is to be met by not going beyond what is reasonably [31] necessary to serve whatever *other* Congressionally-mandated policies are inherent in the exemption itself, while at the same time preserving to the fullest extent possible the basic policy of competition.[29]

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such a separate agency, the associations may act together under the principle that if the act of the agent is lawful, the same act performed by the principal is also lawful. *Id.* at 214. The court, however, did not say that either the existence or nonexistence of a common marketing agency *between* cooperatives has any bearing on the legality of the activity of the *individual* cooperatives. On *that* issue, the court went into a long discussion of what is "collectively marketing" by a single cooperative. In this case, contrary to respondent's argument, there is no issue of a common marketing agency as between cooperatives. The main issue here is analagous to the second part of *Treasure Valley*—*i.e.*, does Central, as an individual cooperative, engage in the kind of activity which is exempt by Capper-Volstead?

[28] *Northern Pacific Railway Co., et al.* v. *United States*, 356 U.S. 1, at 4 (1958).

[29] "It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible . . . The intention of the legislature to repeal 'must be clear and manifest' . . . There must be a positive repugnance between the provisions of the new law, and those of the old; and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy." *United States* v. *Borden Co.*, 308 U.S. 188, at 198-199 (1939). See, also, *Federal Maritime Commission* v. *Seatrain Lines, Inc.*,

(Continued)

In this instance, the exemption, reflects a Congressionally-mandated policy of permitting relief of a certain kind to farmers who face the disadvantages (and, presumably, the low prices) which result from being small, disorganized, scattered, subject to the vagaries of the weather, and in many other respects, largely the victims of contingencies beyond their control.[30] Relief, insofar as Capper-Volstead is concerned,[31] was to be granted in the form of allowing a pooling of resources into a single democratically-functioning "corporate" entity which was to meet in [32] open market and bargain with large buyers.[32] Viewed in the light of our basic economic policy, the purpose of Capper-Volstead, then, was to allow the creation of an organizational unit which could *compete* effectively in the market and have its prices determined by equality, or near equality, of strength rather than by the autocratic power of oligopsonists. As Congressman Volstead said,

> The farmers are not asking a chance to oppress the public, but insist that they should be given a fair opportunity to meet business conditions as they exist — a condition that is very unfair under the present law. Whenever a farmer seeks to sell his products he meets in the market place the representatives of vast aggregations of organized capital that largely determine the price of his products. Personally he has very little if anything to say about the price. If he seeks to associate himself with his neighbors for the purpose of *collectively negotiating* for a fair price, he is threatened with prosecution [*i.e.*, under the Sherman Act].[33]

[33] Against this legislative background, the Ninth Circuit could conclude in *Treasure Valley* that formation of a cooperative bargaining unit was at least not inconsistent with the notion of allowing farmers to join together and form a single bargaining unit as a way of overcoming the imbalance in bargaining power which was said to exist between small, family farmers and corporate middlemen. Here, however, there is no joining together of farmers in any sense contemplated by the act or even within the broad definition of "marketing" advanced by *Treasure Valley*. Instead, a group of

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411 U.S. 726 (1973); *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, at 372-74 (1973); *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963); *Silver* v. *NYSE*, 373 U.S. 341 (1963); *United States* v. *McKesson & Robbins*, 351 U.S. 305 (1956).

[30] *Tigner* v. *Texas*, 310 U.S. 141 (1940).

[31] It must be stressed that we are not dealing here with the *total* agricultural policy of the United States. Capper-Volstead is but a segment of that policy relating to collective marketing as one remedy to some of the farmers' problems. 61 Cong. Rec. 1042 (1921) (remarks of Cong. Sumners). Other facets of that policy — "parity" prices, restrictions on production, marketing agreements, and "soil banks" — indicate no dearth of tools when Congress desires to raise or stabilize prices in ways other than by allowing farmers to negotiate as a group.

[32] See, H.R. Report No. 24, 67th Congress, 1st Session (1921); 61 Cong. Rec. 1033 (1921) (remarks of Cong. Volstead); 62 Cong. Rec. 2057 (1922) (remarks of Senator Volstead); Hearings on S. 4344 Before a Subcommittee on the Senate Committee on the Judiciary, 66th Cong., 2nd Sess., at 49 (1920) (remarks of Senator Brandegee).

In the legislative debates there are also references to the prospect of eliminating unnecessary middlemen entirely, by encouraging farmers, through their collective marketing efforts, to sell directly to consumers, 62 Cong. Rec. 2255 (1922) (remarks of Senator Norris).

[33] H.R. Report No. 24, 67th Congress, 1st Session (1921), at p. 2. [Emphasis added.]

growers simply put into effect a plan to manipulate the market price and then go their separate ways.

The fact that they do go their separate ways (after first agreeing on price) contradicts the basic assumption of the exemption — namely, that farmers are to be allowed to band together to redress a presumed imbalance in bargaining strength. Nowhere in the legislative history of the Act is there a suggestion that farmers are to be given an exemption to resort to their own devices and to make whatever agreements or arrangements they may wish to inflict on a substantial part of commerce.[34] Such an interpretation of the exemption would not only bring it into direct conflict with our basic economic policy, but it would be contrary to the legislative goal of allowing farmers to unite into single bargaining units for the purpose of *counteracting* price-fixing by handlers and middlemen. To this effect, in *Liberty Warehouse Co.* v. *Burley Tobacco Growers' Co-Operative Marketing Association,* 276 U.S. 71 (1928), the Supreme Court quoted with approval the opinion of the Kentucky Supreme Court upholding the Bingham Act [Kentucky Co-operative Incorporating Statute]:

> We take judicial knowledge of the history of the country and of current events and from that source we know that conditions at the time of the enactment of the Bingham Act were such that the agricultural producer was at the mercy of speculators and others *who fixed the price of the selling producer and the final consumer through combinations and other arrangements,* [34] *whether valid or invalid,* and that by reason thereof the former obtained a grossly inadequate price for his products. So much so was that the case that the intermediate handlers between the producer and the final consumer injuriously operated upon both classes and fattened and flourished at their expense. It was and is also a well known fact that without the agricultural producer society could not exist and the oppression brought about in the manner indicated was driving him from his farm thereby creating a condition fully justifying an exception in his case from any provision of the common law, and likewise justifying legislative action in the exercise of its police power.[35]

Legislatures, in short, knew too well the evils which had resulted from fixing the price of farm produce by powerful middlemen, and it is untenable that they would entrust to *either* party to the transaction — a cooperative of selling producers or a combine of buyers — power to fix market prices to the possible detriment of the consuming public. Indeed, both the limited state and Federal exemptions to the antitrust laws which were given to farmers were based on the assumption that combinations of farmers would *not* subject the general public to monopolistic or restrictive practices. In *Tigner* v. *Texas,* the Supreme Court said:

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[34] See, Findings 37, 38.

[35] 276 U.S. 71, at 93. [Emphasis added.]

> Farmers were widely scattered and inured to habits of individualism, their economic fate was in large measure dependent upon contigencies beyond their control. In these circumstances, legislators may well have thought combinations of farmers and stockmen presented no threat to the community, or, at least, the threat was of a different order from that arising through combinations of industrialists and middlemen.[36]

[35] Not only were the cooperatives not considered a "threat" to the community, they were looked on, as I indicated above, as a way of *promoting* competition. The House Report by Congressman Volstead on the exemption legislation declares:

> it is not sought to place these associations above the law [Sherman Act] but to grant them the same immunity from prosecution that corporations now enjoy [*i.e.*, in terms of allowing the existence of corporate organizations] so that they may be able to do business successfully *in competition* with them.[37]

Manifestly, there was no purpose in Capper-Volstead to make the national economic policy as reflected in the antitrust laws inapplicable to the farm industry; the purpose was to assure fair and vigorous competition where formerly one side — the buyers — were able to dictate terms. Consistent with the objective of fair competition and the limited means chosen to accomplish that objective — *i.e.*, allowing farmers an exemption to organize and then to sell or bargain as one unit — the courts have uniformly said that *certain* cooperative activity does not conform with this legislative plan however organizationally "pure" the cooperative may be, and no matter how directly the questioned activity relates to the ultimate price to be realized by the farmers. Thus, in *United States* v. *Borden*, the Supreme Court held that the Pure Milk Association, a milk producers cooperative, had engaged in a criminal violation of Section 1 of the Sherman Act when it conspired with milk distributors to fix and maintain uniform and noncompetitive milk prices in the Chicago area. While affirming the right of agricultural producers "to unite in preparing for market and marketing their products," the Supreme Court said that the Capper-Volstead Act does not "authorize any

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[36] 310 U.S. 141 at 145 (1940). In the Congressional debates on Capper-Volstead, the threat of a farm monopoly was rejected ("In the case of the farmer it is impossible for him through these farm organizations and under this bill to create a trust or monopoly such as is contemplated by antitrust laws" 61 Cong. Rec. 1044 (1921) (remarks of Cong. Hersey)). See also, 62 Cong. Rec. 2053 (1922) (remarks of Senator Kellogg) and 62 Cong. Rec. 2059 (1922), where Senator Capper said, ". . . a farmer's monopoly is impossible. If the cooperative marketing association makes its price too high, the result is inevitable self-destruction by overproduction in the following years."

[37] H.R. Report No. 24, 67th Cong., 1st Session (1921), at p. 3. [Emphasis added.] There is other internal evidence in the Act that Congress did not intend to give farmers the power to fix market prices ". . . in restricting membership to producers. Congress also intended to limit in a rough way the amount of market power which could be controlled by such organizations." *Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 389 U.S. 384 at 398-399 (opinion of Mr. Justice Harlan, concurring and dissenting).

combination or conspiracy with other persons in restraint of trade that these producers may see fit to devise."[38] It is particularly significant [36] that in *Borden,* the Court said that it was unable to accept the view of the district court which had held that the Act "legalizes price-fixing for those within its purview."[39] The Supreme Court stated:

> . . . *the conspiracy charged is not that of merely forming a collective association of producers to market their products* but a conspiracy, or conspiracies, with major distributors and their allied groups, with labor officials, municipal officials, and others in order to maintain artificial and non-competitive prices to be paid to all producers for all fluid milk produced in Illinois and neighboring States and marketed in the Chicago area, and thus in effect, as the indictment is construed by the court below "to compel independent distributors to exact a like price from their customers" and also to control "the supply of fluid milk permitted to be brought to Chicago." . . . Such a combined attempt of all the defendants, producers, distributors and their allies, to control the market finds no justification in § 1 of the Capper-Volstead Act.[40]

While it is true that *Borden* involved a conspiracy with "others," the rationale of the opinion should apply to any attempt by a cooperative to do more (at least with respect to price) than organize and function as a single bargaining unit. In *Maryland and Virginia Milk Producers Assn.,* the Supreme Court, relying on *Borden,* held that even where a cooperative of dairy farmers acts *by itself* it may be found to be in violation of Section 2 of the Sherman Act where it attempts to manipulate the market by such tactics as interfering with truck shipments [37] of nonmembers, and boycotting a dairy's farm supply store in order to compel it to buy from the cooperative.[41]

Addressing the question of the exemption granted by Section 6 of the Clayton Act, the Supreme Court held in *Maryland and Virginia Milk Producers Assn.:*

> Thus the full effect of § 6 is that a group of farmers acting together as a single entity in an association cannot be restrained "from lawfully carrying out the legitimate objectives thereof" but the section cannot support the contention that it gives such an entity full freedom to engage in predatory trade practices at will.[42]

Turning, next, to the scope of Capper-Volstead, the Supreme Court said that the Act was intended to allow individual farmers acting

[38] *United States* v. *Borden Co.,* 308 U.S. 188, at 204 (1939).

[39] *Id.* at 205.

[40] *Id.* at 205 [emphasis added].

[41] *Maryland and Virginia Milk Producers Assn.* v. *United States,* 362 U.S. 458 (1960). In addition, on the basis of *Maryland and Virginia Milk Producers Assn.,* resale price maintenance or vertical price-fixing is clearly forbidden to cooperatives. *Bergjans Farm Dairy Co.* v. *Sanitary Milk Producers,* 241 F.Supp. 476 (E.D.Mo. 1965), *aff'd,* 368 F.2d 679.

[42] *Id.* at 465-466.

through cooperatives the same competitive advantages as other forms of corporations, but "the Act did not leave the cooperatives free to engage in practices against other persons in order to monopolize trade or restrain and suppress competition with the cooperative."

By the same token, where there is no more than an agreement by farmers to fix the market price, I believe this is, in the words of *Maryland and Virginia Milk Assn.*, an attempt to "restrain and suppress competition." It is not "collectively marketing" as that term is used in Capper-Volstead, because the term cannot be read to exceed the legislative purpose — to allow farmers to join together and bargain as one. There was no legislative purpose to sanction a market-rigging private price arrangement of the kind involved in this case.

[38] Apparently this case presents a new question on which no Federal court has had an opportunity to rule one way or the other — that is, whether internal price-fixing by farmers in the absence of any other collective marketing activities is exempt under Capper-Volstead. As far as I know, there is only one Federal case which has plainly held that the Clayton Act and the Capper-Volstead Act exempt a naked price-fixing agreement as between otherwise legitimately functioning cooperatives. This was *United States* v. *Maryland Cooperative Milk Producers, Inc.*, 145 F.Supp. 151 (D.C.D.C. 1956), a conspiracy involving two cooperatives who were fixing prices to the Army at Fort Meade.[43] Because the Government lost *Maryland Cooperative*, it could not appeal, but it is hardly reliable authority considering the fact that the district court which decided the case was the *same* court which rendered the lower court opinion in *United States* v. *Maryland and Virginia Milk Producers Ass'n*, 167 F.Supp. 45 (D.C.D.C. 1958). In both Maryland milk cases, the lower court opinions are based on the view that cooperatives were totally immune from the Sherman Act in the absence of any conspiracy with other persons. The second Maryland milk case, however, *was* appealable, and this theory of total immunity was totally rejected in *Maryland and Virginia Milk Producers Assn.* v. *United States*, 362 U.S. 458 (1960). Moreover, in *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962), where the Supreme Court was presented with the opportunity to apply the total immunity concept to an inter-cooperative agreement, it did not cite the reasoning of *Maryland Cooperative* and said, instead, that

[43] While *Maryland Cooperative* contains expansive language about the immunity for price-fixing by cooperatives, the case is not squarely in point since the district court relied, at least in part, on the language in Section 1 of Capper-Volstead relating to common marketing agencies as *between* cooperatives. 145 F.Supp. 151 at 154-55. See, also, Footnote 27, *supra*.

because all the cooperatives involved were part of Sunkist, their existence as separate corporations had no economic significance.

[39] In reaching the conclusion that I have — to sustain complaint counsel's Motion for Summary Decision — I necessarily conclude that it is irrelevant that the lettuce growers usually agree on a ceiling price only (although at least once they set a floor, too) and that in evidentiary hearings it might develop that there may have been some instances where some growers sold below the "lid" (*i.e.*, ceiling price), and that the lid, itself may on occasion be less than "going" market price.[44] Since the 22 lettuce growers do not have an exemption, they come within *Trenton Potteries:*

> The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed.[45]

There are several additional points which must be considered. First, the argument has been made that where a group of farmers operating under the cover of the cooperative exemption fixes market prices, the sole remedy contemplated by Congress is for the Secretary of Agriculture to convene a proceeding under Section 2 of the Capper-Volstead Act and determine whether the market price has been "unduly enhanced."[46] The Supreme Court, however, has plainly held in *Borden* that the powers given the Secretary of Agriculture are merely "auxiliary" and that the "procedure for which § 2 [of Capper-Volstead] provides is not to be deemed to be designed to take the place of or to postpone or prevent, prosecution under § 1 of the Sherman Act for the purpose of punishing such conspiracies."[47] Since Section 5 of the Federal Trade Commission Act minimally registers all Sherman Act violations, *FTC* v. *Cement Institute,* 333 U.S. 683 (1948), the Commission, like [40] the Justice Department, is not precluded from challenging an illegal price-fixing conspiracy which could lead to unduly enhanced prices.

Second, respondents argue that the Commission's own interpretation of another exemption — the Webb-Pomerene Act, 40 Stat. 517 (1918), 15 U.S.C. 62 — allows exporters to agree on a price and then sell individually. Such an interpretation, of course, would be perfectly consistent with the Congressional purpose of Webb-Pomerene of depriving foreign buyers of the benefits of competition among

[44] Supplemental Affidavit of Henry Franta in Support of Respondents' Motion for Summary Decision (January 27, 1975) and Proposed Finding 34 of Respondents' Proposed Findings of Fact and Conclusions of Law (February 21, 1975).

[45] *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, at 397 (1927).

[46] The Secretary of Agriculture has never issued an order under Section 2 of Capper-Volstead.

[47] 308 U.S. 188, at 205-206 (1939).

American firms, without in any significant way depriving American consumers of the advantages of competition. *United States* v. *Concentrated Phosphate Export Assn., Inc., et al.*, 393 U.S. 199 (1968). There is nothing in Capper-Volstead which suggests that Congress intended that farmers be allowed the same rights as exporters or that domestic consumers of farm produce were to be treated under the same competitive standards as the foreign businessmen.

Finally, while I am convinced that a price-fixing agreement standing alone is not condoned by the strict interpretation of Capper-Volstead which I have followed,[48] the dilemma posed by this case, is that the legal alternative to illegal price-fixing may create still additional problems for consumers. By the terms of the "Notice Order" filed with this complaint, respondents are not precluded from forming a cooperative which either acquires and bargains to sell the entire production of its members, or merely bargains for the members in the open market on the basis of prices agreed to by the members.[49] [41] Should the lettuce growers decide to form such a cooperative, the assumption of the Act is that with the imbalance in the bargaining strength of sellers and buyers having been redressed, the ultimate price will be determined on the basis of ordinary give-and-take of the market. The legislative judgment behind that assumption may have been proven faulty with the passage of time and the emergence of selling cooperatives which may have significant market power.[50] What is especially troublesome to me is that the market price which may be commanded by a cooperative which bargains on the basis of one man control over 60 percent of production may be more inflexible than the price fixed internally on 60 percent of production with the understanding that each member of the conspiracy will sell on its own. A firm hold by one bargaining agent on 60 percent of production may be infinitely more difficult to break than a conspiracy of 22 independent sellers who eventually can be expected to "cheat" or "shade" on the price-fixed terms.

Notwithstanding the *possibility* that an even more restrictive cooperative may be formed by the lettuce producers, I believe an order disbanding Central as it is presently constituted — *i.e.*, as a mere forum for price-fixing — is appropriate. There is some evidence

[48] See text at Footnotes 28-29, *supra*. See also, *Case-Swayne Co.* v. *Sunkist Growers*, 389 U.S. 384, at 393 (1967) ("We deal here with 'special exceptions to a general legislative plan' . . . (§ 6 of the Clayton Act), and therefore we are not justified in expanding the Act's coverage . . . .").

[49] Such an agreement among the members setting the cooperative's own selling or bargaining price is clearly not illegal price-fixing. *Maryland and Virginia Milk Producers Assn.* v. *United States*, 362 U.S. 458, 468; *Treasure Valley Bargaining Assn.* v. *Ore-Ida*, 497 F.2d 203 (9th Cir. 1974).

[50] See Testimony of Thomas E. Kauper, *Hearings Before The Subcommittee On Monopolies and Commercial Law Of The House Comm. On The Judiciary*, 93rd Cong., 1st Sess., ser. 15, at 4 (1973). Mr. Kauper's views were sharply challenged by the National Counsel of Farmer Cooperatives. *Id.* at 576.

that its members neither wanted, needed, nor will they claim the advantages of selling or bargaining as one — the *only* advantage allowed under the exemption. The stipulated facts are (1) that there are established relationships between certain growers and certain wholesalers, and (2) that through the use of individual labels some growers have been able to establish some measure of trade recognition for quality.[51] The producers of these [42] more highly regarded labels, particularly those with established relationships, may see very little advantage in being lumped together with their less efficient neighbors. In other words, it may turn out that *all* that the lettuce producers *ever* wanted from their neighbors was an agreement to eliminate some distressful pricing practices, and that, in fact, some, if not all of the growers, *prefer* to confront the market alone. As I indicated above, where the method of operation demonstrates no need (or, for that matter, desire) to bargain collectively, there is no exemption. From the stipulated facts, one cannot tell how important these non-price factors are, and what alternative course the members may pursue if they are not allowed to get together solely to fix prices. In any event, the antitrust laws do not permit a price-fixing conspiracy to remain in effect because of the mere possibility that the price-fixers may attempt to exploit whatever legal loopholes now exist in an antitrust exemption.

The long-range solution, of course, is that the consuming public should not have to face the Hobson's choice between a group of farmers who fix prices illegally and a cooperative which legally sets its own price and then may "fix" it on the basis of significant market power.

In sum, perhaps Congress should be told that the major assumptions underlying the exemption, itself, are now open to serious question because (1) the exemption is being claimed by giant agribusinesses, like United Brands in this case, which have resources that are far different from those of the small family farmers who were Congress' concern in 1922;[52] and (2) that despite [43] the regulatory safety-valve contemplated by Section 2 of the Act, the exemption may fall into the hands of cooperatives who may have

[51] Finding 9.

[52] While the legislative history shows that the purpose of the Capper-Volstead Act was to redress the imbalance which existed between the relatively powerless individuals who toil the land and large marketing corporations, nevertheless, the Supreme Court has not denied the exemption when some of the producers were corporate farmers. In *Case-Swayne Co.* v. *Sunkist Growers*, 389 U.S. 384 (1967), the Supreme Court notes, without additional comment, the presence of "corporate growers" and it addresses itself, instead, to the antitrust consequences of membership in the association of nongrower packing houses. *Id.* at 387.

Apparently no decided case has directly dealt with the issue of whether giant corporate agribusinesses, like United Brands, are even eligible for an exemption which assumes a lack of bargaining strength due to size. In any event, I do not presume to perform the legislative function of reading a "dollar" or "size" limit into a statute where none exists, and the size of some of the members of Central has not been a consideration in this decision.

enough market power to set prices in much the same anticompetitive ways as combines of middlemen.

IV

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction in this matter because (a) the action is in the public interest; (b) respondents are engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act,[53] and (c) respondents have no exemption from Section 5 of the Federal Trade Commission Act.

2. The antitrust exemption for agricultural producers conferred by Section 6 of the Clayton Act and the Capper-Volstead Act is a limited exemption, providing only that agricultural producers may organize together in associations to collectively process, prepare for market, handle and market their agricultural products.

3. A cooperative association which does not have any contacts with the outside commercial world, and which, specifically, does not grow, harvest, ship, sell, bargain or compete for the sale of any agricultural products and merely serves as a forum for a price-fixing agreement does not engage in collective processing, preparing for market, handling and marketing as those terms are used in the Capper-Volstead Act.

[44] 4. Central California Lettuce Producers Cooperative (Central) does not engage in the collective processing, preparing for market, handling and marketing of the agricultural products of its members and it is not permitted by virtue of Section 6 of the Clayton Act and the Capper-Volstead Act to serve as a forum in which its individual members agree to fix the prices at which the individual members will sell their lettuce.

5. The individually named respondents and Central conspired together to fix the prices at which each respondent member of Central would sell lettuce at the Salinas-Watsonville-King City shipping point, and each respondent member of Central, during the period of the complaint, did sell lettuce at prices agreed upon under the auspices of Central, which activities constitute a violation of Section 5 of the Federal Trade Commission Act.

Accordingly, complaint counsel's motion for summary decision is granted, and the following order will be issued:

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[53] Central is engaged in commerce by reason of the fact that it is used by interstate sellers as an instrumentality of fixing interstate prices. See, *FTC* v. *Cement Institute*, 333 U.S. 683 (1948).

ORDER

It is ordered, That respondent Central California Lettuce Producers Cooperative and the respondent marketers,[54] individually and collectively:

[45] 1. Cease and desist from entering into any agreement, understanding or course of dealing between any respondent marketer and any other marketers of fresh produce, including other respondent marketers, as to factors which may affect the prices, the price ranges, price ceilings, or price floors at which any respondent marketer and any other marketers of fresh produce, including other respondent marketers, individually sell or offer to sell their fresh produce.

2. Cease and desist from the adherence, in any manner, by any respondent marketer to any agreement, understanding or course of dealing as to factors which may affect the prices, the price ranges, the price ceilings, or price floors at which any respondent marketer and any other marketers of fresh produce, including other respondent marketers, individually sell or offer to sell their fresh produce.

It is further ordered, That respondent Central California Lettuce Producers Cooperative be dissolved, and that respondent marketers cease and desist from the formation of any association, or the joining of any association, among whose purposes or activities are the discussion of or agreement on factors which may affect the prices, price ranges, price ceilings, or price floors [46] at which members of such association individually sell their fresh produce.

It is further ordered, That respondent marketers deliver a copy of this Order to all present and future personnel of said respondent engaged in the offering for sale, or sale of fresh produce.

It is further ordered, That respondent marketers notify the Commission at least thirty (30) days prior to any proposed change in said respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in said respondents which may affect compliance obligations arising out of this order.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

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[54] Admiral Packing Company; Albert C. Hansen d/b/a Hansen Farms; California Coastal Farms, Inc.; Carl Joseph Maggio, Inc.; D'Arrigo Bros. Co. of California; Eckel Produce Co.; Green Valley Produce Co-op; Growers Exchange, Inc.; Harden Farms of California; J. R. Norton Co.; Jack T. Baillie Co., Inc.; Let-Us-Pak; Merit Packing Co.; Merrill Farms; Pacific Lettuce; R. T. Englund Co.; Royal Packing Co.; Salinas Lettuce Farmers Cooperative; Salinas Marketing Cooperative; The Garin Co.; United Brands Company; and West Coast Farms.

OPINION OF THE COMMISSION

BY COLLIER, *Commissioner:*

[2] The complaint in this matter was issued on June 10, 1974, charging Central California Lettuce Producers Cooperative, a corporation ("Central"), and 22 of Central's members, with violating Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) by illegally agreeing among themselves on the prices at which Central's members would sell the lettuce they produce.

[3] On the basis of a stipulated factual record, Administrative Law Judge ("ALJ") Morton Needelman entered an initial decision on March 13, 1975, sustaining the allegations of the complaint and recommending the issuance of an order to cease and desist. The respondents appealed to the Commission. Argument on the appeal was heard on October 1, 1975; the Commission ordered reargument, which was heard on June 30, 1976.

The facts are undisputed. Central was incorporated on June 8, 1972, as a nonprofit cooperative association without capital stock under California law (I.D. 2),[1] and began operating in May of the following year after signing an identical "Cooperative Marketing Agreement" ("CMA") with each of the 22 other respondents (I.D. 3). During 1973, Central's members shipped over 20 million cartons of lettuce out of a total of approximately 77,678,000 cartons shipped from all California areas, and approximately 110,622,000 from all areas in the United States (I.D. 37).

Central neither grows, harvests nor ships lettuce in its own name. Central does not negotiate directly with lettuce buyers and does not enter directly into sales agreements with buyers. It has no sales personnel in its own name, and no receipts from lettuce sales (I.D. 22). Rather, each member enters into separate arrangements with buyers for the sale of his own lettuce. Members sell under their own trade names (although they stamp Central's name on their cartons as well). Since lettuce produced in different fields by different growers at different times commands different prices (I.D. 8) the members compete among themselves for the same customers, and each member bills and collects its own accounts (I.D. 24).

"All that Central does, that is of any significance to this case," the ALJ concluded, "is to serve as a meeting ground for the lettuce producers to come together and agree on pricing policy." (I.D. p. 27). Under the terms of the CMA, Central's members bind themselves to sell all their lettuce through the cooperative, and only at prices

[1] The following abbreviations are used in this opinion: I.D.—Initial Decision, Finding No. I.D. p.—Initial Decision, Page No. Stip.—Stipulation.

within the limits of ceiling and floor prices set by the cooperative [4] (I.D. 25).[2] During the 1973 season, Central's Executive Committee (on which each respondent member had a seat) met several times and agreed on ceiling prices for the members' lettuce, although there was only one occasion on which a floor price was set (I.D. 28, 35, 36).

It is clear that the activities of Central and its members violate Section 1 of the Sherman Act (15 U.S.C. 1), and thus Section 5 of the F.T.C. Act, unless the respondents' conduct falls within some exemption to the antitrust laws.[3] The respondents claim three separate sources of exemption: Section 6 of the Clayton Act (15 U.S.C. 17), Section 1 of the Capper-Volstead Act (7 U.S.C. 291), and Section 5 of the Cooperative Marketing Act of 1926 (7 U.S.C. 455). Complaint counsel contest Central's eligibility for any of these exemptions. They contend that no ostensible cooperative whose predominant (if not sole) function is to fix the prices at which its individual members sell their products can take advantage of the cooperative exemptions conferred by Congress, however those exemptions are construed.

I. JURISDICTION

Section 2 of the Capper-Volstead Act (7 U.S.C. 292) provides, in pertinent part:

> [5] That if the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached, or contained therein, a notice of hearing, specifying a day and place not less than thirty days after the service thereof, requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade. . . .

The respondents argue that Section 2 specifies the exclusive remedy against the antitrust transgressions of cooperatives meeting the criteria of Section 1 of Capper-Volstead. The Supreme Court has squarely rejected this position on two occasions and the Commission has rejected it on a third. *United States* v. *Borden Co.*, 308 U.S. 188,

[2] The CMA also bound Central's members to other obligations, including certain uniform terms and conditions of sale, the rendering of crop reports, and steps to reduce the amount of surplus lettuce on the market ("unsold rollers") (I.D. 25). Central performs certain other educational and informational functions.

[3] Since complaint counsel not surprisingly relied on well-settled principles of per se illegality, the stipulated record contains no indication of the effects of the respondents' conduct on quantities or prices of lettuce. For example, there is no indication whether any of respondents' lettuce is withheld entirely from the market as a result of establishing prices that are too high to clear the market. Nor is it clear whether stabilization of lettuce prices after the formation of Central was attributable to its activities or whether, if so, it was the result either of Central's pricing policies or Central's efforts to furnish timely information on market conditions to growers (see I.D. 6, 10, 17, 19, 20, 25 B, 33). As explained below, note 20, different questions might be presented if respondents' pricing practices had the effect of imposing production or quality restrictions on lettuce.

205-06 (1939); *Maryland and Virginia Milk Producers Association, Inc.* v. *U.S.*, 362 U.S. 458, 562-63 (1960); *Washington Crab Association*, 66 F.T.C. 45, 122 (1964).[4]

The respondents attempt to distinguish these cases from their own because Central and its members are charged neither with combining with outsiders nor with predatory practices. We find no support for such a distinction in the reasoning of these authorities, and the respondents fail to offer any reasons of their own for so narrowly confining the clear holdings.

II. CAPPER-VOLSTEAD EXEMPTION

The central question is whether the respondents' conduct is covered by Section 1 of the Capper-Volstead Act which reads, in relevant part, as follows:

> That persons engaged in the production of agricultural products as farmer, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, [6] such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: . . .[5]

Complaint counsel make two arguments why respondent cannot claim the exemption. First, they argue that a qualifying cooperative must engage in all of these enumerated functions. Concededly, Central does not collectively process, prepare for market, or handle the products of its members. This argument, however, fails to find support in the plain language of the statute. Section 1 of the Capper-Volstead Act enumerates those activities in which a qualifying association "may" engage. It does not, by its terms, constitute a checklist of functions that must be performed. No cases are cited in [7] support of complaint counsel's reading of the statute and, as noted below, Congress has manifested no intent to mandate any particular

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[4] *Marketing Assistance Plan, Inc.* v. *Associated Milk Producers, Inc.*, 338 F. Supp. 1019, 1024 (S.D. Tex. 1972).

[5] The rest of Section 1 reads:

Provided, however, That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

Second. That the association does not pay dividends on stock or membership capital in excess of 8 percentum per annum.

And in any case to the following:

Third. That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members.

Complaint counsel do not contest Central's compliance with these structural requirements.

degree of vertical integration as a precondition to Capper-Volstead immunity.

Complaint counsel's second argument, accepted by the Administrative Law Judge, is that respondent is not engaged in "collectively. . .marketing" within the meaning of the statute. This issue is at the core of the case and warrants more extended treatment.

Legislative History

Because the words of the statute are undefined, a review of its legislative history is in order.

The 1922 Capper-Volstead Act was enacted in response to Congressional concern that Section 6 of the Clayton Act[6] put undue organizational limitations on the cooperative exemption by denying it to associations either organized for profit or having capital stock. There was also concern that Section 6 failed adequately to protect even those cooperatives which could qualify because the exemption was not clearly stated. Indictments of cooperatives and their members by allegedly overzealous prosecutors were cited in hearings and debate.[7] Although many of Capper-Volstead's proponents maintained that Section 6 fully shielded the cooperative activities of farmers, they argued that the threat of even unjustified prosecutions deterred cooperative development. Senator Norris said in dabate: "They say, 'We will be threatened, and because we have not got it explicitly in black and [8] white the farmers are afraid. The people in the business circulate propaganda and write letters, and so forth, and the farmers are afraid to come in.' So that as a matter of fact as to the great bulk of the producers I am of the opinion that it is more a matter of psychology than anything else. I do not believe they violate the law now when they organize."[8]

In the course of considering the perceived shortcomings of existing law, however, considerable discussion took place on the theory of cooperative organization and how it was expected to improve the lot of the farmer. Two themes predominated. The first was a theory of countervailing power: that farmers should be able to unite to bargain

[6] That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws. (15 U.S.C. 17).

[7] 61 Cong. Rec. 1037 (1921) (remarks of Rep. Volstead); 62 Cong. Rec. 2259 (1922) (remarks of Sen. Norris); *Association of Producers of Agricultural Products: Hearing on S. 4344 Before Subcomm. of Senate Judiciary Comm.*, 66th Cong., 2d Sess. 27-28 (1920) (statement of Charles A. Lyman).

[8] 62 Cong. Rec. 2165 (1922).

effectively with middlemen. The confederation of producers was expected to enable farmers to gain higher prices.[9] The second theme was the expectation that farmers would use cooperative associations as a vehicle for vertical integration, not only to confront the middleman but to supplant him and deal more directly with consumers. The integrated cooperative was expected to achieve economies by performing processing and distribution functions, and to divide up the savings realized through higher returns to farmers and lower retail prices for consumers.[10]

Both themes appear in the House Reports on Capper-Volstead. Rep. Volstead advised the full House:

> Whenever a farmer seeks to sell his products he meets in the marketplace the representatives of vast aggregations of organized capital that largely determine the price of his products. Personally he has very little if anything to say about the price. If he seeks to associate himself [9] with his neighbors for the purpose of collectively negotiating for a fair price, he is threatened with prosecution. Many of the corporations with which he is compelled to deal are each composed of from thirty to forty thousand members. These members collectively do business as one person. The officers of the corporation act as agents of these members. This bill, if it becomes a law, will allow farmers to form like associations, the officers of which will act as agents for their members.
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> * * * * * * *
>
> While this bill confers on farmers certain privileges, it can not properly be said to be class legislation. Business corporation have under existing law all the powers and privileges sought to be conferred on farm organizations by this bill. Instead of granting a class privilege, it aims to equalize existing privileges by changing the law applicable to ordinary business corporations so farmers can take advantage of it.[11]

While speaking the language of effective bargaining, however, the report used an illustration of vertical integration: the inability of small, farmer-owned grain elevators to join together and accumulate enough capacity to deal directly with millers. The report also said:

> (European farmers' associations) have tended to prevent much of the gambling in foodstuffs and to eliminate many of the useless middlemen that stand between the producers, the retailers, and the consumers.[12]

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[9] 59 Cong. Rec. 8022 (1920) (remarks of Rep. Sumners of Tex.) ("There must be given to agriculture some compensatory advantage to offset the present economic advantage which industry holds by reason of the fact that it can write into the selling price which it fixes all cost of production plus a profit."); 61 Cong. Rec. 1038 (1921) (remarks of Rep. Reavis); 62 Cong. Rec. 2223 (1922) (remarks of Sen. Lenroot); 59 Cong. Rec. 7856 (1920) (remarks of Rep. Evans of Nebr.).

[10] 62 Cong. Rec. 2059-60 (1922) (remarks of Sen. Capper); 62 Cong. Rec. 2257 (1922) (remarks of Sen. Norris); 59 Cong. Rec. 7852 (1920) (remarks of Rep. Morgan); 59 Cong. Rec. 8022 (1920) (remarks of Rep. Swope).

[11] H.R. Rep. No. 24, 67th Cong., 1st Sess. 2 (1921).

[12] *Id.* at 3.

Although Congress seems to have expected cooperatives to assume middlemen's functions,[13] it is not at all clear that Congress intended to deny the benefits of Capper-Volstead [10] to any cooperative that did not step into the shoes of the middleman. The vertically integrated cooperative may have been a contemplated form of organization, but, in light of the additional intention to enhance farmers' bargaining effectiveness, it does not follow that it was intended to be exclusive.

Nor does the legislative history demonstrate specific consideration of the meaning of the statutory phrase, "collectively processing, preparing for market, handling, and marketing," let alone "collectively marketing" in isolation. Both complaint counsel and counsel for respondents concede that there is no direct evidence in the legislative history of what precisely Congress meant by the word "marketing".

The legislative history is equally inconclusive on Congress' intent with respect to agreements among members of a cooperative over prices. The debates contain several approving references to the ability of the cooperative members to "fix prices," a power sometimes compared with corporate behavior.[14] It is not clear, however, that Congress intended to require farmers to combine as tightly as they would were they to incorporate. Production, for example, remained under individual control,[15] and a mainspring of the legislation was, in fact, the assumed impossibility of farmer incorporation.[16]

In summary, although price-setting was clearly a contemplated activity, the legislative history does not address the question whether or what kind of additional activity is required to qualify for the exemption. [11]

Judicial Interpretation

As framed by complaint counsel, the issue in this case is one of first impression, with the exception of a recent factually identical private action brought against Central itself. *Northern California Supermarkets Inc.* v. *Central California Lettuce Producers Cooperative,* 413

[13] It is clear, of course, that the permissible goal of vertical integration does not immunize agreements with other or predatory conduct to achieve this goal. *Maryland and Virginia Milk Producers Association, Inc.* v. *U.S.; United States* v. *Borden Co.; Washington Crab Association; supra; Case-Swayne Co. Inc.* v. *Sunkist Growers, Inc.*, 389 U.S. 384 (1967).

[14] 62 Cong. Rec. 2223 (1922) (remarks of Sen. Lenroot); 59 Cong. Rec. 8025 (1920) (remarks of Rep. Hersman).

[15] 62 Cong. Rec. 2058 (1922) (remarks of Sen. Capper) ("Because of this peculiar characteristic of agriculture, the growers have never been able to adopt a corporate form of organization; they have, therefore, gradually fitted into the cooperative form of organization *which maintains the individuality of production* but enables them to unite for marketing purposes." (emphasis added). *But see* 62 Cong. Rec. 2225 (1922) (remarks of Sen. Lenroot) ("If the farmers of the United States could, through cooperation, have some control and agreement as to production and as to prices. . . ."). See note 20 below.

[16] H.R. Rep. No. 24, 67th Cong., 1st Sess. 2-3 (1921).

F. Supp. 984 (N.D. Cal. 1976), *appeal docketed,* No. 76-1456 (9th Cir., March 8, 1976). While it has been held that the members and officers of a single lawfully constituted agricultural cooperative cannot, for that reason alone, violate Sections 1 and 2 of the Sherman Act by conspiring with each other,[17] the question raised by complaint counsel goes back a step: is a cooperative on Central's model lawfully constituted in the first place?

The Ninth Circuit considered a closely related issue in *Treasure Valley Potato Bargaining Ass'n.* v. *Ore-Ida Foods Inc.,* 497 F.2d 203 (9th Cir.), *cert. denied,* 419 U.S. 999 (1974). In that case cooperative activities consisted of bargaining with processors for preseason contracts under which cooperative members would sell their potatoes. The court rejected an antitrust attack on this conduct, stating:

> We think the term *marketing* is far broader than the word *sell.* A common definition of "marketing" is this: "The aggregate of functions involved in transferring title and in moving goods from producer to consumer, including *among others* buying, selling, storing, transporting, standardizing, financing, risk bearing, and *supplying market information.*" Webster's New Collegiate Dictionary, 1953 Edition. (Emphasis added). The associations here were engaged in bargaining for the sales to be made by their individual members. This necessarily requires supplying market information and performing other acts that are part of the aggregate of functions involved in the transferring of title to the potatoes. The associations were thus clearly performing "marketing" functions within the plain meaning of the term. We see no reason to give that word a special meaning within the context of the Capper-Volstead Act. 497 F.2d at 215 (emphasis in original).

[12] Neither complaint counsel nor the ALJ discovered the answer in *Treasure Valley,* because that case involved bargaining for preseason contracts with buyers on behalf of cooperative members, while the respondent members here merely agree under the aegis of Central on the prices which they will seek individually. The district judge in *Northern California Supermarkets* dismissed this argument as "a distinction without a difference," 413 F. Supp. at 992. He found Central's activities within the term "marketing" as construed in *Treasure Valley* and concluded:

> Moreover, I am of the opinion that even if Central engaged in no other collective marketing activities, mere price-fixing is clearly within the ambit of the statutory protection. It would be ironic and anomalous to expose producers, who meet in a cooperative to set prices, to antitrust liability, knowing full well that if the same producers engage in even more anticompetitive practices, such as

[17] *April* v. *National Cranberry Ass'n.,* 168 F. Supp. 919, 920 (D. Mass. 1958); *Shoenberg Farms, Inc.* v. *Denver Milk Producers, Inc.,* 231 F. Supp. 266 (D. Col. 1964). At the same time, it is equally well-established that a cooperative is not thereby immune from charges of monopolization. See *Muirbrook Farms, Inc.* v. *Western General Dairies,* C 75-177 (D. Utah March 17, 1977) (Order on Summary Judgment Motion); and cases cited in note 13, *supra.*

collective marketing or bargaining, they would clearly be entitled to an exemption.

It is true that the sponsors of Capper-Volstead were laboring under the assumption that the cooperative or association would be the collective marketing agent for the farmers in most circumstances. However, there is nothing in the legislative history that suggests a Congressional intention to *force* farmers into a corporate form or that collective marketing with the cooperative as the exclusive agent was considered the *only* form under which farmers' groups could organize. *Id.* (emphasis in original) (footnote omitted).

Whatever "marketing" activity excludes, it would surely seem to include establishing an asking price as an essential element of negotiations looking toward a sale.

Complaint counsel take issue with this reasoning, pointing to the Supreme Court's characterization of the exemption in *Maryland and Virginia Milk Producers Ass'n.* v. *U.S., supra:*

> [13] We believe that it is reasonably clear that from the very language of the Capper-Volstead Act, as it was in §6 of the Clayton Act, that the general philosophy of both was simply that individual farmers should be given, through agricultural cooperatives acting as, entities, the same unified competitive advantage—and responsibility—available to businessmen acting through corporations as entities. As the House Report on the Capper-Volstead Act said:
>
> > Instead of granting a class privilege, it aims to equalize existing privileges by changing the law applicable to the ordinary business corporations so that the farmers can take advantage of it.
>
> This indicates a purpose to make it possible for farmer-producers to organize together, set association policy, fix prices at which their cooperative will sell their produce, and otherwise carry on like a business corporation without thereby violating the antitrust laws. 362 U.S. at 466 (footnote omitted).

Although the intracooperative activity of the defendant in *Maryland and Virginia* was not at issue, but rather its acquisition of one competitor and its preying upon others, complaint counsel find in the phrases, "agricultural cooperatives acting as entities," and, "fix prices at which their cooperative will sell their products," a minimum standard for cooperative status that Central cannot meet. Unfortunately, the word "entity" does not provide a standard any more precise or discriminating than "collective marketing." To say that a cooperative has to do business as a single business entity in its own right does not reveal how many activities the cooperative must perform to qualify.

To conclude that a cooperative may lawfully function as a corporate entity does not compel or even support the additional conclusion that it must perform an undefined list of corporate functions. Neither the Court's opinion nor the legislative history on

which it is grounded provides a basis for using the otherwise helpful corporate analogy in this fashion. The Commission's opinion in *Washington Crab Association, supra,* concedes the right of a fisherman's cooperative to sell at a single, agreed-upon price. Quoting the same passage from *Maryland and Virginia* upon which complaint counsel rely, the Commission said: [14] "The single corporation can, of course, 'fix' the prices of its various 'divisions,' with no duty to require them to compete with each other. Similarly, these 140 crab fishermen can create a single marketing agent—Washington Crab Association—to 'fix' a single price to be charged by all of its fishermen members, thus eliminating by agreement all competition between them."[18] The Commission continued: "The ends—the 'legitimate objectives' of such cooperative association and its members—are the collective catching, processing, and marketing of its members' product. . . . Price-fixing is an approved objective, but it cannot be pursued by techniques that go beyond those provided by the statute."[19] In short, the Commission placed intra-cooperative price-fixing on a par with collective catching, processing, and marketing as an acceptable objective of a fishermen's cooperative. We cannot find in *Washington Crab* a limitation of the exemption to cooperatives that engage in "collective catching, processing, and marketing of (their) members' product," especially since the phrase merely describes how that particular respondent did business.

In short, like the legislative history, the principal cases relied on by complaint counsel readily accept intra-cooperative pricing agreements as a necessary incident of collective marketing. They do not establish a threshhold for the cooperative's level of additional activity below which this conduct becomes illegitimate.

Complaint counsel's argument is not strengthened by the anomaly it introduces: as the ALJ clearly perceived (I.D. pp. 40-43), reorganizing the cooperative to assign it more functions is likely to lead to a more rigid form of collusion than the existing arrangement. The question, of course, is what Congress intended; we are not permitted the luxury of equating a nonexempt Tweedledum with an exempt Tweedledee. Nevertheless, complaint counsel have not advanced a convincing explanation why the distinction they urge will promote either agricultural policy or antitrust policy. The ALJ speculated that the cooperative might splinter if it were required to perform additional, unspecified functions which he assumed would mean the end of some members' valuable brand identification. But the

[18] *Washington Crab Association,* 66 F.T.C. 45, 106 (1964).

[19] *Id.* The Commission reviewed those nonexempt techniques, which included combination with nonproducers, monopolization, coercion, and other predatory practices.

stipulated record does not [15] tell us whether lettuce can be marketed efficiently without individual labels (I.D. 9), or even whether a bargaining cooperative under these circumstances would necessarily abandon individual labels. In any case, it is hard to see why entitlement to Capper-Volstead treatment should depend on whether the product is highly perishable and differentiated and thus most suitable for sale in the field (like lettuce), or only moderately perishable and relatively fungible and thus suitable for single preseason sales transactions (like potatoes).

In this regard, it is instructive to compare the Supreme Court's treatment of the Capper-Volstead exemption in *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962) with *Case-Swayne Co., Inc.* v. *Sunkist Growers, Inc.*, 389 U.S. 384 (1967). In *Winckler & Smith*, the trial court had given a jury instruction that would have permitted a conspiracy to be found among three cooperatives even though the same group of 12,000 producers owned all three. Noting that the producers could have united in a single cooperative without fear of illegal combination or conspiracy, the Court said: "(W)e feel that the 12,000 growers here involved are in practical effect and in the contemplation of the statutes one 'organization' or 'association' even though they have formally organized themselves into three separate legal entities. To hold otherwise would be to impose grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect to these growers who have banded together for processing and marketing purposes within the purview of the Clayton and Capper-Volstead Acts." 370 U.S. at 29. In *Case-Swayne*, however, the Court found Sunkist's activities nonexempt on a different ground: the cooperative had included nonproducing processors, a class of persons clearly not entitled to Capper-Volstead.

The pair of Sunkist cases demonstrate that the explicit requirements of Capper-Volstead are to be applied strictly. No vague policy friendly toward agricultural cooperation is to be permitted to expand the scope of the exemption beyond what the statute and its legislative history warrant, and restrictions on membership, structure and activity should be rigorously observed. At the same time, we are unwilling to read into Capper-Volstead, as the lower courts did in *Winckler & Smith*, formalistic internal limitations on otherwise conforming cooperatives. The Supreme Court there refused to find a forfeiture of the exemption and to order the cooperatives to reshuffle their affiars, a step with no apparent practical effect. We are equally reluctant to do so here. [16] While the absence of practical effect would not justify the inclusion of ineligible parties, as in *Case-Swayne*

or the pursuit of prohibited objectives, it is hard to see why a single group of eligible producers should be prevented from pursuing an authorized object because of failure to observe a moot formality.

Conclusion

Congress clearly intended that cooperatives provide farmer-members with a restricted license to unify and balance their combined strength and information against the corporations with which they deal. By the same token, it may well be that Congress intended cooperatives to have few if any advantages over an ordinary corporation in their dealings with outsiders. But the weakness in complaint counsel's position is the assumption that the corporate analogy provides an internal standard for cooperatives as well as an external one.[20] As previously noted, Congress regarded farmer incorporation as impossible even if it were desirable, and [17] intended to permit farmers the competitive advantages of incorporation without compelling them to adopt a corporate form. One of those advantages appears to have been the ability to exchange information about and agree on the prices it would seek from purchasers. We can find no indication that Congress intended that advantage to be available only to cooperatives who adopt, as complaint counsel argue, "a corporation-like instrument with which to deal with other corporations," or, as the ALJ found, "a pooling of resources into a single democratically functioning 'corporate' entity which was to meet in open market and bargain with large buyers." (I.D. pp. 31-32) These standards are nowhere to be found in or fairly inferred from the statute, the legislative history or the decided cases. Indeed, in the absence of more precise guidelines not supported by the record in this

[20] Congress' attitude toward production controls provides an additional indication that it did not regard the corporation as the model around which the Capper-Volstead exemption would be built. Beyond doubt, a single corporation can restrict its output, if it chooses, without incurring antitrust liability. Nevertheless, there are strong indications that Congress did not intend to allow farmers to use cooperatives as a vehicle by which they could effectively agree to limit production. Sen. Capper said in debate:

> But a farmers' monopoly is impossible. If the cooperative marketing association makes its price too high, the result is inevitable self-destruction by overproduction in the following years. No other industry except agriculture has this automatic safeguard. With corporation activities the group producers, such as the United States Steel Corporation, can reduce the quantity of steel rails it will produce at any given time or completely close down its mills and reduce the supply. 62 Cong. Rec. 2059 (1922).

See also fn. 15, *supra; Authorizing Association of Producers of Agricultural Products: Hearings on H.R. 2373 Before Subcomm. of Senate Judiciary Comm.*, 67th Cong., 1st Sess. 201-202 (1921) (statement of Sec. of Agr. Henry C. Wallace). Congress has reinforced the interpretation that production controls were not authorized by adding to the Capper-Volstead Act a comprehensive statutory scheme for controlling supply in the form of the Agricultural Marketing Agreement Act of 1937 (AMAA), 7 U.S.C. 601 *et seq.* A different issue would be presented if it were alleged and proven that a cooperative had sought to limit production even among its own members, thus shutting off the safety valve against private abuse that ameliorates the adverse consumer impact of the Capper-Volstead exemption and circumventing the important procedural safeguards of the AMAA. Although Central's bylaws prohibited the regulation of plantings or production (Stip. Exhibit B-2, Section 5.14), its cooperative marketing agreement permitted "volume controls" under certain circumstances (Stip. Exhibit A, Par. 2(C)). The issue of cooperative production control was not litigated here.

case, a cooperative would be hard-pressed to know just what degree of corporate integration would be required to qualify under Capper-Volstead were we to adopt complaint counsel's theory.

If, as in *Treasure Valley,* it is sufficient merely for the cooperative to unite producers in "collectively negotiating" over price, legal consequences should not attach if the cooperative presents the results of its decisions through each member rather than through a single agent representing each member. It would seem to make little sense, for example, to require that the employees of the growers become employees of Central only to thereafter go about their business of [18] negotiating the sale on different terms of individual members' crops in their fields or cooling plants (I.D. 8). As the Supreme Court said, in a different context, the Capper-Volstead Act does not lend itself "to such an incongruous immunity-distinction . . . as that urged here."[21]

In view of our conclusion with respect to the application of the Capper-Volstead Act to the facts of this case, we see no need to consider whether Sec. 6 of the Clayton Act or the Cooperative Marketing Act of 1926 provide independent authorization for the respondents' activity. The respondents' motions to dismiss dated Oct. 1, 1975, and June 10, 1976 are denied as moot.

An appropriate order will be entered vacating the order issued by the Administrative Law Judge and dismissing the complaint.

[2] Final Order

This matter having been heard by the Commission upon the appeal of respondent from the administrative law judge's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission, for the reasons stated in the accompanying opinion, having concluded that the administrative law judge's initial decision should be set aside and that the complaint should be dismissed:

[3] It is ordered, That the administrative law judge's initial decision be, and it hereby is, set aside.

It is further ordered, That the complaint be, and it hereby is, dismissed.

Chairman Pertschuk was recorded as not participating.

[21] *Maryland and Virginia Milk Producers Ass'n., Inc.* v. *U.S.*, 362 U.S. 458, 464 (1960).

IN THE MATTER OF

NEW RAPIDS CARPET CENTER, INC., ET AL.

ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket 9052. Complaint, Aug. 26, 1975 — Order, July 26, 1977

This order, among other things, requires Lee Kantor, a/k/a Lee Woods, a Bronx, N.Y. retailer of carpets, furniture and major appliances, to cease using bait and switch tactics, and other unfair or deceptive techniques in the advertising and sale of its products; to cease failing to make relevant disclosures in contracts regarding quantity/unit cost data; and customers' right to cancellation and refund. Additionally, the firm must advise delinquent customers of impending collection suits and bring such suits only in the county where the customer resides or signed the contract. The order also requires the firm to provide consumers, in connection with the extension of credit, such material and disclosures as are required by Federal Reserve System regulations.

Appearances

For the Commission: *Irving C. Koch* and *Diana Kirigin,* Consumer Protection Specialist, assisting.

For the respondents: *Sol S. Perlow,* New York City.

COMPLAINT

[1] Pursuant to the provisions of the Federal Trade Commission Act and of the Truth in Lending Act and the regulations promulgated thereunder, and by virtue of the authority vested in it by said Acts and regulation, the Federal Trade Commission having reason to believe that New Rapids Carpet Center, Inc., Charge Account Factors, Inc. and Charge Account Credit Corp., corporations, and Lee Kantor, a/k/a Lee Woods (hereinafter sometimes referred to as Lee Kantor), individually and as General Manager of New Rapids Carpet Center, Inc., as an officer [2] of Charge Account Factors, Inc. and Charge Account Credit Corp., and as an individual doing business as New Rapids Furniture Warehouses, Inc. [formerly a New York corporation dissolved by proclamation of the Secretary of State on December 15, 1970], hereinafter referred to as respondents, have violated the provisions of said Acts and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondents New Rapids Carpet Center, Inc. and Charge Account Factors, Inc. are corporations organized, existing and doing business under and by virtue of the laws of the State of

New York; respondent Charge Account Credit Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey; and respondent Lee Kantor is an individual doing business as New Rapids Furniture Warehouses, Inc. [formerly a New York corporation dissolved by proclamation of the Secretary of State on December 15, 1970] and is also General Manager of respondent New Rapids Carpet Center, Inc. and an officer of respondents Charge Account Factors, Inc. and Charge Account Credit Corp.

The corporate and individual respondents named in Paragraph One maintain their principal place of business and offices at 4195 Third Ave., Bronx, New York. In addition, respondent Charge Account Factors, Inc. maintains a mail address at 1746 Andrews Ave., c/o Abe Kantor, Bronx, New York, and respondent Charge Account Credit Corp. maintains a mail address at 330 Windsor Road, Englewood, New Jersey.

PAR. 2. Respondent Lee Kantor is General Manager of respondent New Rapids Carpet Center, Inc., an officer of respondents Charge Account Factors, Inc. and Charge Account Credit Corp. and does business as New Rapids Furniture Warehouses, Inc. and during the time of its corporate existence was general manager [3] of New Rapids Furniture Warehouses, Inc. He formulates, directs and controls the policies of the corporate respondents named in Paragraphs One and Two, including the acts and practices hereinafter set forth.

PAR. 3. The corporate and individual respondents named in Paragraphs One and Two do not operate as separate independent corporate or individual business entities, but are components of one business entity which respondent Lee Kantor dominates and controls. He shifts and assigns the personnel of each corporate and individual respondent to function and perform duties for the other corporate and individual respondents so that as a consequence a nexus of such degree exists between and among each of the corporate and individual respondents that they have lost their individual identities. Thus, the acts and practices of each of the corporate and individual respondents named in Paragraphs One and Two may be deemed the acts and practices of all of the other corporate and individual respondents named in said Paragraphs One and Two.

PAR. 4. Respondents New Rapids Carpet Center, Inc. and Lee Kantor, individually and as General Manager of New Rapids Carpet Center, Inc., are now, and have been for some time last past, engaged in business as a retailer of carpets, and respondent Lee Kantor, both individually and doing business as New Rapids Furniture Warehous-

es, Inc., is now, and has been for some time last past, engaged in business as a retailer of furniture, major appliances and carpets, all of the said respondents offering for sale and selling their respective products to the consuming public on a cash or credit basis. Respondents sell and ship their products from New York State to purchasers located in other States of the United States. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce as "commerce" is defined in the Federal Trade Commission Act. [4]

In the course and conduct of their business in connection with sales made on credit, respondents New Rapids Carpet Center, Inc. and Lee Kantor assign or transfer their installment sales contract paper, which each of said respondents secure from purchasers of their respective products, to their two affiliated companies, respondents Charge Account Credit Corp. and Charge Account Factors, Inc., for collection purposes only.

In furtherance of their collection objectives, respondents Charge Account Credit Corp. and Charge Account Factors, Inc. currently and for some time last past have issued coupon payment books to the aforesaid purchasers, many of whom are residents of the State of New Jersey, have used the facilities of the United States mail to solicit and obtain payments from said purchasers, and have used the facilities of the courts of the State of New York to sue residents of the State of New Jersey. In connection with the foregoing activities, respondents Charge Account Credit Corp. and Charge Account Factors, Inc. maintain and at all times mentioned herein have maintained, a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

As an integrated operation, all of said respondents referred to in this Paragraph Four, in the course and conduct of their aforesaid business, and at all times mentioned herein, have been, and now are, in substantial competition, in commerce, with corporations, firms and individuals in the offering for sale, and sale, of furniture, major appliances and carpets and other products of the same general kind and nature as that sold by said respondents and in the collection of monies allegedly due in connection therewith.

PAR. 5. Respondent New Rapids Carpet Center, Inc. for a period of time last past entered [5] into and maintained a limited business relationship with another firm with which it otherwise had no legal or official corporate connection, and which firm is unnamed as a corporate respondent or party herein, and hereinafter will be referred to as "The Advertiser" for the purpose of identity. The Advertiser was, during the period of time in question, similarly

engaged in business as a retailer of carpets and floor coverings which it offered for sale and sold to the consuming public.

In the course and conduct of its business The Advertiser caused the dissemination of certain advertisements for carpeting, including but not limited to, advertisements on radio and television broadcasts transmitted by radio and television stations having sufficient power to carry such broadcasts across state lines, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of its merchandise.

In addition, The Advertiser, directly or indirectly, assigned, transferred or sold to respondent New Rapids Carpet Center, Inc. the names and addresses of residents of the State of New Jersey who responded in the State of New Jersey to the advertisements disseminated as aforesaid by The Advertiser.

COUNT I

Alleging violations of Section 5 of the Federal Trade Commission Act by respondents New Rapids Carpet Center, Inc., and Lee Kantor individually and as General Manager of New Rapids Carpet Center, Inc., the allegations of Paragraphs One, Two, Three, Four and Five hereof are incorporated by reference in Count I, as if fully set forth verbatim.

PAR. 6. In the course and conduct of its aforesaid business, and for the purpose of inducing the purchase of its products, The Advertiser made certain representations in its aforesaid radio and television advertisements to purchasers and [6] potential purchasers residing in the States of New York and New Jersey with respect to the identity of the vendor and the nature and terms and conditions of its offers.

PAR. 7. Typical but not all inclusive of the statements appearing in the television commercials disseminated as aforesaid are the following:

SLIDE I	NEED LUXURY CARPETING? NOW [THE ADVERTISER] IS RUNNING, THEIR GREATEST CARPET SPECIAL EVER. . .
SLIDE II	[THE ADVERTISER] DESIGNS CUTS CARPET PRICES. . .NOW! GET ENOUGH BROADLOOM TO CARPET ANY AREA OF YOUR HOME OR APARTMENT, UP TO 150 SQUARE FEET, CUT, MEASURED,

AND READY FOR INSTALLATION FOR ONLY $77 _____

SLIDE III — GET A REAL CARPET BUY. . .GET 100% DUPONT CONTINUOUS FILAMENT NYLON PILE BROADLOOM, FOR ONLY $77 _____

SLIDE IV — ENOUGH BROADLOOM TO CARPET A LIVINGROOM, OR BEDROOM, OR DINING AREA, DURING THIS SPECIAL OFFER, FOR ONLY $77 ONLY $77 CALL NOW _____

SLIDE V — CALL NOW. . .GET INCLUDED WITH YOUR ORDER, AN UPRIGHT LEWYT VACUUM CLEANER, OR A 9X12 RUG . . . CALL NOW MURRAYHILL [X XXXX]

SLIDE VI — FOR FREE INFORMATION, IN NEW YORK, L.IL. WEST CHESTER CALL MURRAYHILL [X XXXX] MU[X XXXX] THATS MURRAYHILL [X XXXX] IN N.J. CALL ESSEX [X XXXX] _____THATS ESSEX [X XXXX] OUT OF TOWN, PLEASE CALL COLLECT. . .

[7] PAR. 8. By and through the use of the aforesaid advertisements and others of similar import and meaning not specifically set out herein, The Advertiser represented, directly or by implication that:

The offers set forth in said advertisements were bona fide offers by The Advertiser to sell to residents of the State of New Jersey the advertised carpeting on the terms and conditions set forth in the advertisement, to wit:

1. The carpet would be "continuous filament nylon pile broadloom."

2. Before installation, the floor area would be accurately measured and the carpeting would be properly cut to fit the area to be covered.

3. The carpeting was being offered by The Advertiser at a "special" or sale price.

4. By placing an order for carpeting with The Advertiser the purchaser would receive from said firm a *free gift* of either a vacuum cleaner or a 9 x 12 rug.

PAR. 9. In truth and in fact:

The offer set forth in the aforesaid advertising, and in similar advertising, was not a bona fide offer by The Advertiser to sell to residents of the State of New Jersey the advertised carpeting on the terms and conditions set forth in the advertisement. [8]

To the contrary, The Advertiser never intended to sell the advertised carpeting under any terms or conditions to residents of the State of New Jersey.

PAR. 10. In the course and conduct of its business as aforesaid, The Advertiser transferred the names and addresses of New Jersey residents who responded to the aforesaid advertisements to respondents New Rapids Carpet Center, Inc. and Lee Kantor, individually and as general manager of New Rapids Carpet Center, Inc. who then sent salesmen to the homes of said New Jersey residents for the purpose of selling carpeting.

PAR. 11. In the course and conduct of their business, and in furtherance of a sales program for inducing the purchase of their carpeting, respondents New Rapids Carpet Center, Inc. and Lee Kantor, individually and as General Manager of New Rapids Carpet Center, Inc., through their salesmen and representatives, have engaged in the following unfair, false, misleading and deceptive acts and practices:

1. In a substantial number of cases the salesmen did not accurately measure the area to be covered and the carpeting was not cut to fit the area measured.

2. In a substantial number of cases the respondents did not supply "continuous filament nylon pile broadloom" but pieced the broadloom to simulate "continuous filament nylon pile broadloom" with the result that there was excessive seaming. [9]

3. The carpeting was not sold at a "special" or sales price but at the usual and customary retail price for respondents' merchandise.

4. In a substantial number of cases persons who purchased carpeting from the respondents did not receive a gift and some were told the gift was not available to purchasers of more expensive carpeting.

Therefore, the statements, representations and practices as set forth in Paragraph Seven were, and are, false, misleading and deceptive.

PAR. 12. In the course and conduct of their business, and in furtherance of a sales program for inducing the purchase of their carpeting, respondents New Rapids Carpet Center, Inc. and Lee Kantor, individually and as General Manager of New Rapids Carpet Center, Inc., through their salesmen and representatives, have

engaged in the following unfair, false, misleading and deceptive acts and practices:

1. Prospective purchasers who questioned respondents' salesmen were told they worked for New Rapids Carpet Center, Inc. *and* The Advertiser.

2. In a substantial number of cases the salesmen had no samples of the advertised carpet and told the prospect it was unavailable or out of stock, or disparaged the advertised carpet and used the opportunity to sell carpeting at a higher price, and prospects who insisted on purchasing the lower-priced carpet as advertised were permitted by the salesmen to sign the contract at the lower price, as advertised, but carpeting was never delivered as per the agreed contract.

Therefore, the statements, representations and practices as set forth above were, and are, false, misleading and deceptive. [10]

PAR. 13. The promotional activities of The Advertiser as described in Paragraphs Six, Seven, Eight, Nine, Ten and Twelve above and the resulting leads sold, transferred and assigned to New Rapids Carpet Center, Inc. were exploited by respondents New Rapids Carpet Center, Inc. and Lee Kantor, individually and as General Manager of New Rapids Carpet Center, Inc. by their misleading the purchasing public as to the identity of the vendor, the nature of the offer and all the terms and conditions of the offer.

PAR. 14. The use by respondents New Rapids Carpet Center, Inc. and Lee Kantor, individually and as General Manager of New Rapids Carpet Center, Inc. of the aforesaid false, misleading and deceptive statements, representations and practices has had the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations, were and are true and into the purchase of products of the aforesaid respondents New Rapids Carpet Center, Inc. and Lee Kantor, individually and as General Manager of New Rapids Carpet Center, Inc. by reason of said erroneous and mistaken belief.

PAR. 15. The aforesaid acts and practices of respondents as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

Alleging further violation of Section 5 of the Federal Trade Commission Act by respondents New Rapids Carpet Center, Inc. and Lee Kantor, individually and as General Manager of New Rapids

Carpet Center, Inc. and as an individual doing business as New Rapids Furniture Warehouses, Inc., the allegations of Paragraphs One, Two and Four are incorporated by reference in Count II as if fully set forth verbatim. [11]

PAR. 16. In the further course and conduct of their business, and in furtherance of their purpose of inducing the purchase of carpeting by the general public, respondents New Rapids Carpet Center, Inc. and Lee Kantor, individually and as General Manager of New Rapids Carpet Center, Inc. and as an individual doing business as New Rapids Furniture Warehouses, Inc. and their representatives, directly or indirectly, have engaged in the following additional acts and practices:

1. In a substantial number of instances, through the use of the false, misleading and deceptive statements, representations and practices set forth in Paragraphs Eleven and Twelve above, respondents or their representatives have been able to induce customers to sign a contract upon initial contact without giving the customer sufficient time to carefully consider the purchase and consequences thereof.

2. At the time of the sale of carpeting, respondents' salesmen write across the face of the sales contract, "Eight (or Ten or Twelve) year wear guarantee." By the use of such representations, respondents and their representatives have implied that the carpeting is guaranteed to wear for eight (or ten or twelve) years without adequately disclosing: (1) the nature and extent of the guarantee; (2) the conditions and limitations on the guarantee and (3) the manner in which the guarantor will perform. In a substantial number of instances, the respondents have not performed under the implied terms and conditions of the guarantee.

3. In a substantial number of instances, the respondents have substituted or have attempted to substitute carpeting which was used or soiled or of a different quality and color from that ordered by the purchaser and such purchaser was informed that he must accept the substituted item. [12]

4. In the circumstances set forth in subparagraph 3 above, where the purchaser refused delivery, respondents have instituted lawsuits to effect payment.

5. When writing up sales contracts, respondents' salesmen did not state the yardage nor the price per yard but merely stated carpeting and the total cost. Thus, customers were unable to check the amount of carpeting actually used against the amount for which they were charged and were deprived of the opportunity to compare unit costs with those charged by respondents' competitors.

Therefore, respondents' statements, representations, acts and practices as set forth in Paragraph Sixteen herein were, and are, unfair, false, misleading and deceptive acts and practices.

PAR. 17. By and through the use of the aforesaid acts and practices, respondents New Rapids Carpet Center, Inc. and Lee Kantor, individually and as General Manager of New Rapids Carpet Center, Inc. and as an individual doing business as New Rapids Furniture Warehouses, Inc. have misled and deceived the purchasing public in the manner and as to the matters herein alleged.

PAR. 18. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

COUNT III

Alleging further violations of Section 5 of the Federal Trade Commission Act by respondents New Rapids Carpet Center, Inc., Charge Account Factors, Inc., and Lee Kantor, individually and as General Manager of New Rapids Carpet Center, Inc., and as an officer of Charge Account Factors, Inc., and Charge Account Credit Corp. and as an individual doing business as New Rapids Furniture Warehouses, Inc., the [13] allegations of Paragraphs One, Two and Four are incorporated by reference in Count III as if fully set forth verbatim.

PAR. 19. In the further course and conduct of their business, respondents New Rapids Carpet Center, Inc. and Lee Kantor, individually and as General Manager of New Rapids Carpet Center, Inc. permitted and are permitting customers to purchase carpeting on a deferred payment plan. Respondent New Rapids Carpet Center, Inc. assigns retail installment contracts executed by purchasers of carpeting to respondent Charge Account Factors, Inc. Charge Account Factors, Inc. transferred the retail installment contracts signed by customers who did not receive the carpeting to New Rapids Furniture Warehouses, Inc. during the time of its corporate existence, and after its dissolution to Lee Kantor doing business as New Rapids Furniture Warehouses, Inc.

In the further course and conduct of his business, respondent Lee Kantor doing business as New Rapids Furniture Warehouses, Inc. permitted and is permitting customers to purchase carpeting and furniture on a deferred payment plan. Respondent at times assigns

retail installment contracts executed by purchasers of carpeting and furniture to respondent Charge Account Credit Corp.

In furtherance of their purpose to collect allegedly delinquent debts and to induce payment by allegedly delinquent debtors, respondents and their agents have engaged in the following additional unfair acts and practices:

1. Respondents New Rapids Carpet Center, Inc., Charge Account Factors, Inc., Lee Kantor, individually and as General Manager of New Rapids Carpet Center, Inc. and as an individual doing business as New Rapids Furniture Warehouses, Inc. have instituted suits in the Civil Court of the City of New York against allegedly delinquent New Jersey residents, and thus have utilized a forum for lawsuit which has made it inconvenient and expensive for the New Jersey residents to appear and defend. In most such lawsuits default judgments have been entered against the New Jersey residents. [14]

2. Respondents New Rapids Carpet Center, Inc., Charge Account Factors, Inc., Charge Account Credit Crop., and Lee Kantor, individually and as General Manager of New Rapids Carpet Center, Inc., and as an officer of Charge Account Factors, Inc. and Charge Account Credit Corp. and as an individual doing business as New Rapids Furniture Warehouses, Inc., have failed to serve allegedly delinquent debtors with notice of suit. In a substantial number of cases, respondents utilized a process server who was also an employee of respondents and who failed to serve process on persons sued as required by law and thereafter filed with the court false affidavits of service.

3. The respondents named in subparagraph 2 above, entered default judgments against debtors who had no knowledge of suits against them and in a substantial number of cases, failed to inform judgment debtors who remitted payment after the entry of the default judgment that judgments have been entered against them.

4. The respondents named in subparagraph 2 above, failed to credit against the default judgments payments made subsequent to the entry of such default judgments.

5. The respondents named in subparagraph 2 above, sued for amounts in excess of the amounts actually due.

6. In some instances, said respondents sued for the total amount of the contract despite failure to deliver the merchandise ordered.

7. In some instances, said respondents secured income executions on the basis of default judgments against debtors who had not been served with process and thereby obtained payment of alleged debts, thus depriving such debtors of the opportunity to defend themselves in court.

8. Respondents in a substantial number of instances have failed to file satisfactions or partial satisfactions of judgments when judgments have been paid in full or partially satisfied. [15]

The use by respondents of the aforesaid practices has had the tendency and capacity to mislead and deceive many persons into thinking that valid judgments have been obtained against them and that binding obligations to pay have been received as a result thereof and to pay substantial sums on alleged debts or obligations which they might otherwise not have paid, or has tended to deny debtors a reasonable opportunity to appear, answer and defend lawsuits instituted against them. Therefore, the practices set forth in Paragraph Nineteen were and are unfair, false, misleading and deceptive acts and practices.

PAR. 20. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and contstiuted, and now constitute unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

COUNT IV

Alleging violations of the Truth in Lending Act and the implementing regulation promulgated thereunder, and of the Federal Trade Commission Act, on the part of respondents, New Rapids Carpet Center, Inc., Lee Kantor, individually and as general manager of New Rapids Carpet Center, Inc. and as an individual doing business as New Rapids Furniture Warehouses, Inc., the allegations of Paragraphs One, Two and Four are incorporated by reference in Count IV as if fully set forth verbatim.

PAR. 21. Respondents, in the ordinary course and conduct of their business, as aforesaid, and in connection with the extension of consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, have caused and are causing their customers to enter into contracts for the sale of respondents' goods. On their contract, hereinafter referred to as "the contract," respondents provide certain consumer credit cost information. Respondents do not provide their customers with any other consumer credit cost disclosures.

By and through the use of the contract, respondents:

[16] 1. Failed to disclose, before the transaction was consummated as required by Section 226.8(a) of Regulation Z, the following:

(a) The amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments, as required by Section 226.8(b)(4) of Regulation Z.

(b) Identification of the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation, as required by Section 226.8(b)(7) of Regulation Z.

(c) The amount of the finance charge, as required by Section 226.8(c)(8) of Regulation Z.

(d) The annual percentage rate, computed in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z. Where the annual percentage rate was disclosed, it was not stated within the nearest one quarter of one percent as required by Section 226.5(b)(1).

2. Failed to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment, as required by Section 226.8(c)(3) of Regulation Z.

3. Failed to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price," as prescribed by Section 226.8(c)(8)(ii) of Regulation Z.

4. Failed to make the required disclosures clearly, conspicuously and in meaningful sequence, as required by Section 226.6(c) of Regulation Z.

PAR. 22. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of the Truth in Lending Act and pursuant to Section 108 thereof, respondents thereby violated the Federal Trade Commission Act.

INITIAL DECISION BY PAUL R. TEETOR, ADMINISTRATIVE LAW JUDGE

JANUARY 19, 1977

[2] SUMMARY OF THE COMPLAINT

On August 26, 1975 this Commission issued its complaint and notice of proposed order against Lee Kantor, a/k/a Lee Woods (hereafter "Kantor"), a small Bronx retailer of carpets, furniture and major appliances, d/b/a New Rapids Furniture Warehouse, Inc., and certain corporate entities associated with his business. The complaint contained three counts charging violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 5, and one count charging violations of the Truth in Lending Act, Pub. Law 90-321 (1968).

Count I, while never using the phrase "bait and switch," charges an unusual kind of "bait and switch" operation. During an unstated

period (which the evidence showed to be about 1969–71) respondent Kantor purchased sales "leads"[1] elicited by another carpet seller's advertising commercial on a New York City TV/radio station. Because the other firm was located on Long Island, it could not economically make use of the New Jersey "leads" which the commercial generated. Hence the arrangement to sell these leads to respondents. (Paragraphs 5–10) The complaint further charges that respondents' salesmen, after confusing their identity, proceeded to disparage the TV offer and work the customers up to the purchase of much more costly alternative carpeting. (Paragraph 12)

There are also charges that the salesmen involved used other unfair tactics such as (1) failure to supply "continuous filament nylon pile broadloom"; (2) failure to measure carpeting accurately and cut properly; (3) wrongly calling the sale price a "special" and dishonestly promising a "free gift" with every sale. (Paragraphs 8, 11) The first two of these lesser charges were, however, abandoned by complaint counsel in their Trial Brief (at p. 8).

Count II deals with more miscellaneous sales practices alleged to characterize respondents' marketing of carpeting, apparently with particular reference to the New Jersey sales leads described in Count I. These include (1) high-pressure selling, (2) deceptively vague guarantees, (3 & 4) unsatisfactory substitutions for unsatisfactory carpeting and (5) use of contracts which omit to state the quantity purchased or the unit cost. (Paragraphs 16–18)

[3] *Count III* charges respondents with regular abuse of legal process to collect debts arising out of installment credit sales contracts (which were assigned by the carpeting businesses to their financing affiliates). This count is concerned primarily with respondents' default judgments against delinquent customer-debtors allegedly obtained by (1) bringing collection suits against New Jersey residents in an inconvenient form, the Civil Court of the City of New York (Paragraph 19–1) and by deliberately failing to serve notice of such suits on the customer debtors (*i.e.*, so-called "sewer service"). (Paragraph 19–2) A number of lesser abuses of legal process are also alleged.[2]

Count IV charges violations of the Truth in Lending Act by respondents by virtue of failure to disclose before consumation of the transaction, a number of things which by Regulation Z of the Federal Reserve Board must be disclosed before consumation. (Paragraph 21–

[1] Respondent Kantor during the hearing defined "lead" as a prospect". . .somebody who is interested in buying the product which you are selling (Kantor 221–222).

[2] *E.g.*, overclaiming; suing without delivering the goods; garnishing wages with knowledge that judgments had been obtained improperly; failure to credit post-judgment payments; and failure to file satisfactions when paid. (Paragraph 19, sub-paragraphs 3–8)

1) It charges also failure to use the term "unpaid balance of cash price" and to disclose the sum of certain other costs which should be described as the "deferred payment price". (Paragraph 21–3)

The complaint further appended a detailed proposed order against all respondents which the Commission thought likely to be issued if all charges were proven but it reserved the right to make changes needed to protect the public in light of all the facts developed during the adjudicative proceedings here.

History of the Case

Following issuance of the complaint and proposed order, on October 1, 1975, all respondents appeared by attorney Sol S. Perlow, Esquire of the New York bar and were granted an extension of time to answer the complaint until November 5, 1975. On October 30, 1975, respondents filed their joint Answer, denying most allegations, putting complaint counsel to their proof as to others and admitting only a handful of charges.

[4] On November 10, 1975, a prehearing conference was held in Washington and on November 11, 1975, a prehearing order issued, reporting on said conference[3] and laying down a pre-trial preparation schedule to culminate in evidentiary hearings beginning March 8, 1976. On November 25, 1975, complaint counsel filed an informal request for certain discovery which elicited nothing from respondents. On December 16, 1975, complaint counsel also filed 26 Requests For Admissions, none of which evoked any response within the ten days provided by Rule Section 3.31.

Failing to obtain anything of significance by voluntary discovery, on December 17, 1975, complaint counsel sought and on December 24, 1975, the Administrative Law Judge issued a subpoena duces tecum to respondent Kantor, returnable in New York City on January 22, 1976. Further, on notice from complaint counsel that the voluntary discovery originally expected from respondent had not been received, the Administrative Law Judge on December 24, 1975 suspended indefinitely the requirement of Prehearing Order No. 1 that the Commission's case be turned over to respondents by December 29, 1975 (exhibits) and January 7, 1976 (testimonial summaries).

At a prehearing conference held in New York City on January 22, 1976 to receive respondents' return in response to the subpoena duces tecum issued December 24, 1976, respondent Kantor testified that he was producing nothing because some responsive material had been

[3] Among other matters, the Court was advised that settlement negotiations had broken down largely because of failure to agree on the applicability of an order to respondent Lee Kantor individually. Whether or not to subject him to such individual liability has remained the practical issue throughout the history of this matter.

lost in recent break-ins at his store and as for other responsive materials he had not realized until the previous day that production for this subpoena would be required. Following examination as to what documents were or were not still available, Kantor was directed by the Administrative Law Judge to purge his default by producing all responsive documents not waived by complaint counsel at an adjourned prehearing conference to be held at the same place on February 19, 1976.

[5] At the same time, the Administrative Law Judge gave respondents a second chance to answer complaint counsel's Requests For Admissions by responding within 10 days, *i.e.*, by February 2, 1976. No such response was made, however, and on February 12, 1976, complaint counsel moved for summary decision under Rule Section 3.24 on the ground that respondents had failed to answer complaint counsel's Requests For Admissions by February 2, 1976 and by this second default had made the requested admissions, (which parallelled the complaint's allegations) automatically operative and a summary decision appropriate. At the adjourned prehearing conference held in New York City on February 19, 1976, the Administrative Law Judge again offered respondents a *locus penitentiae,* giving them a third chance to respond to the Requests For Admissions if they would actually file good faith answers within a few days. A sworn response by respondent Kantor, dated March 4, 1976, denying most requests and pleading ignorance as to others but admitting eight facts, was, in fact filed and over complaint counsel's strenuous objections (filed March 15, 1976) the Administrative Law Judge in an "Omnibus Order and Trial Setting" dated March 25, 1976, concluded that complaint counsel's examples of "bad faith" in respondents' answers did not quite prove "bad faith." He accordingly allowed the late filing of respondents' answers to complaint counsel's Requests For Admissions and simultaneously denied complaint counsel's motion for summary decision.

Meanwhile, at the adjourned prehearing conference in New York City on February 19, 1976 to receive the return on the subpoena duces tecum to respondent Kantor which had not been forthcoming on January 22, 1976, the effort was again in vain. Again, Kantor appeared without a single business record. Under examination he now supplemented his earlier explanation in terms of break-ins and fires (Kantor 54, 61, 99) with a speculation that other corporate books and records may have been lost somewhere between trips to the New York City Consumer Fraud Bureau and a prior lawyer (one Harris), who died suddenly of kidney trouble without ever returning Kantor his books (Kantor 100, 107, 108). More recent corporate records

"weren't stolen but, frankly, I don't even know where they are. They're all dispersed." (Kantor 101) All records of earlier lawsuits involved here were said to have been left with Kantor's attorney and Kantor did not get them to bring to the hearing because he allegedly did not know they were wanted (Kantor 137). [6] He had tried to locate his "deferred cash" contracts, he said but explained that this effort failed because "when we get into that other room (where they were kept) it's so cold that you can't do anything" (Kantor 136). When questioned as to how long this had been true, he estimated several months (which would extend the cold weather back to summertime). The most recent records had not been written up yet. (Kantor 101) So there was nothing to return. Interestingly, Kantor never invoked here, the explanation given the New York City Department of Consumer Affairs in 1972 was that he could produce none of his records because his file clerk was constantly misfiling them (CX 3 z45).

The Administrative Law Judge noted in his "Omnibus Order and Trial Setting" of March 25, 1976 that Kantor's demeanor reinforced the inference of incredibility to be drawn from what he was saying in attempted explanation of his failure to produce a single business record. The Court concluded that a case had been made for application of sanctions under Rule Section 3.38 and proceeded to order that all documents called for but not produced would be deemed "adverse" to respondents' defense and that secondary evidence might be introduced at trial if necessary to make up for the loss of this primary evidence, in situations where such would be reasonable. The policy laid down was stated thus:

> We do not intend to see this case tried primarily on secondary evidence. However, we shall not hesitate to apply either sanction (presumptions of adverseness and secondary evidence) on motion of complaint counsel whenever it seems fair and necessary to fill particular voids in their case, reasonably related to respondent's failure to produce his business records on subpoena.

On April 8, 1976, in anticipation of trial, complaint counsel requested that respondents admit the genuineness and authenticity of a number of proposed exhibits, copies of which had earlier been served on respondents. No response being forthcoming within 10 days, on motion of complaint counsel under Rule Section 3.31 the Administrative Law Judge on April 28, 1976 declared that said proposed exhibits would be deemed authentic copies of documents correctly described in complaint counsel's request of April 8, 1976.

[7] At a prehearing conference held in New York City on February 19, 1976, complaint counsel was given three weeks to turn over his prospective evidence to respondents, they were given one week

thereafter to request any discovery desired. (Tr. 160) However, no request for discovery was ever made by any respondent.

An "Omnibus Order" dated March 25, 1976, set the case down for trial in New York City on April 26, 1976. In view, however, of the serious illness of respondents' counsel during April, on April 14, 1976, the trial date was put over to May 3, 1976. A trial brief for the assistance of the Administrative Law Judge was filed by complaint counsel voluntarily on April 30, 1976, but none was filed on behalf of respondents.

The hearing of evidence in this matter began in New York City on May 3, 1976 and continued daily through May 10, 1976, on all workdays except May 5, 1976. Because the aid of the U.S. District Court for the Southern District of New York was required to compel the appearance of one of complaint counsel's witnesses (Marvin Fisher), the hearings were adjourned on May 10, 1976, and resumed for a single day on July 27, 1976 to take said Fisher's testimony, after which the hearing was adjourned *sine die* but the record was not closed, pending a ruling by the Administrative Law Judge on the admissibility of a large number of affidavits offered by complaint counsel to fill out voids in his case for, which respondents' refusal to turn over any records was said to be responsible, wholly or in part.

The witnesses who testified at the evidentiary hearings were all called by complaint counsel (including respondent Kantor, who was called as an adverse witness). Their names, addresses, businesses, the dates of their testimony and page references thereto are as follows:

	Name & Address	*Business*	*Date of Testimony*	*Transcript References*
1.	Lee Kantor[4] a/k/a Lee Woods 4195 Third Avenue Bronx, New York	Retailer	5/3/76 5/4/76	205-246 249-279
[8] 2.	Frank DiDonato	Business Reporter for Dunn & Bradstreet	5/4/76	283-336
3.	Edith M. Novack	Asst. Counsel N.Y. State Banking Dept.	5/4/76	336-368

[4] Respondent Kantor also testified extensively during pre-hearing proceedings on January 22, 1976 (pp. 59-108) and February 19, 1976 (pp. 121-145).

4. Leonard S. Cammalleri	Business Reporter for Dunn & Bradstreet	5/6/76	389-410
5. Moira P. McDermott	Retired Attorney FTC	5/6/76	410-480
6. Abraham A. Karlin	Consumer Specialist FTC	5/6/76 5/7/76	481-505 589-617 628-707
7. Joan Francis Cipriani 263 Manning Ave. North Plainfield, New Jersey	Housewife	5/6/76	505-528
8. Nadean Porter 184 Weequahic Ave. Newark, New Jersey	Not Stated	5/6/76	532-554
9. Mildred Mary Crete 437 Carroll Street Orange, New Jersey	Not Stated	5/6/76	555-568
10. Roberta Beard 784 South 15th Street Newark, New Jersey	Not Stated	5/6/76	569-588
11. Jacqueline Burke 635 Castle Hill Avenue Bronx, New York	Not Stated	5/7/76	709-726
12. Edwin Burks	Former FTC Investigator	5/7/76	728-772
[9] 13. William Tomaro 430 62nd Street West New York,	Retired Construction Worker	5/10/76	776-809

New Jersey

14. Aaron Weiss	Attorney Civil Court of City of N.Y.	5/10/76	810-846
15. Marvin Fisher 1381 Jonathan Lane Wantaugh, N.Y.	Salesman, formerly partner in Ideal Design, Inc.	7/27/76	881-909

Although afforded the usual opportunity to call any witnesses and offer any exhibits desired, respondents announced that they would offer neither witnesses nor exhibits in their own defense (Tr. 873).

On August 16, 1976, complaint counsel filed a lengthy brief in favor of his pending offer of certain hearsay evidence (a ruling on the admissibility of which had been deferred at the hearing).[5] Respondents elected to rely on their oral argument and filed no brief (Tr. 909). By order dated October 12, 1976, the Administrative Law Judge, although doubting that he would ordinarily receive the hearsay evidence so offered, nevertheless held that in the circumstances of this case, where complaint counsel had plainly been precluded from finding updating consumer witnesses by respondents' contumacious refusal to turn over any business records on discovery, it was necessary to admit such hearsay testimony to adequately compensate for loss of such discovery opportunity.

On the same date (October 12, 1976), record corrections having meanwhile been accepted, the record in this matter was closed and the parties were given 40 days to file proposed findings of fact and conclusions of law. At respondents' request this deadline was extended on November 22, 1976 to November 29, 1976, and thereafter to December 1, 1976. On November 22, 1976, complaint counsel filed cited proposals for findings of fact and conclusions of law on all aspects of the case. On December 9, 1976, respondent filed a handful of proposed findings and conclusions, without transcript references, consisting [10] solely of conclusionary assertions that respondent Kantor was not individually involved in any offenses and should not be included individually in any cease and desist order.

[5] In one case (CX 93a-z59) the evidence was actually excluded at the hearing and the request was therefore to reverse the exclusion.

FINDINGS OF FACT

Respondent Lee Kantor, d/b/a New Rapids Furniture Warehouses, Inc.

1. Respondent Lee Kantor, sometimes also known as Lee Woods, runs a retail establishment selling carpeting, furniture and appliances at 4195 Third Ave., Bronx, New York, doing business under the name "New Rapids Furniture Warehouses, Inc." (Kantor, 206, 207)

2. Until 1970 this business was carried on by a New York corporation of the same name (New Rapids Furniture Warehouses, Inc.) chartered on June 11, 1962, but on December 15, 1970, said corporation was dissolved by proclamation of the Secretary of State of New York. (CX lg, Kantor 182) Since then the same business has been carried on by Kantor at the same location under the same name (Kantor, 142, 206, 206A). Kantor's testimony during discovery proceedings here (on January 22, 1976 and again on February 19, 1976) that he was even then unaware that this corporation has been dissolved and believed it was "still a going corporation" until he found out about it from complaint counsel, is not credited (Kantor 63, 142).

3. Kantor's wife owned 100 percent of the stock of New Rapids Furniture Warehouses, Inc. and was entitled to all its "earnings." (Kantor 215, 216, CX 3j)

4. Regardless of who had the beneficial ownership of the business known as New Rapids Furniture Warehouses, Inc., it appears that respondent Kantor's wife took no active part in the operation of the business (Kantor 216); that he had the responsibility for its day-to-day operations (Kantor 218) and that he has always been responsible for its policies (Kantor 72). Respondents do not deny that Kantor has formulated, directed and controlled the policies of New Rapids Furniture Warehouses, Inc., including the acts and practices set forth in this complaint. (Respondents' Answer, Paragraph 1) In particular, he has made the arrangements for the company's advertising, because he was the only one who could do it. (Kantor, 221)

Respondent New Rapids Carpet Center, Inc.

5. Respondent New Rapids Carpet Center, Inc., a New York corporation operating out of the same premises as New Rapids Furniture Warehouses, Inc. (Kantor 73), was chartered on April 16, 1969. (CX 1h, Kantor, 182–183) [11] One Stanley Katzman, an employee of Kantor's in the New Rapids Furniture Warehouses, Inc. business, persuaded Kantor to put the furniture warehouse in the

carpet business sometime in the mid-1960's and New Rapids Carpet Center, Inc. was organized tow or three years later to handle the growing carpet business (Kantor 68, 69, 70). At a discovery hearing on January 22, 1976, Kantor was not sure if the corporation had ever been dissolved but testified that "we haven't been using it as a corporation for at least three or four years" (Kantor 62, 63). It was, in fact, dissolved by proclamation of the Secretary of State of New York on December 15, 1973. (CX 1h, Kantor 182-183)

6. As in the case of the furniture warehouse business, the carpet center, according to Kantor, was owned 100 percent by his wife, who was entitled to all its "earnings" (Kantor 215, 216, CX 3j).

7. Respondent Kantor's wife, however, took no active part in the operation of the business (Kantor 216). He, as "General Manager" of New Rapids Carpet Center (CX 106b) was responsible for New Rapids Carpet Center Inc.'s day-to-day operations (Kantor 218) and had "more or less full control of the thing" (Kantor 219). In any event, respondents do not deny that Kantor formulated, directed and controlled the policies of New Rapids Carpet Center, Inc., including the acts and practices challenged in this complaint. (Answer, Paragraph 1)

Respondent Charge Account Factors, Inc.

8. Respondent Charge Account Factors, Inc. was chartered as a New York corporation on October 21, 1955 (CX 1f). In its early years, when respondent Kantor's father Abraham was active to some extent in the business and the office was at 29th St. and Broadway in New York City, this corporation bought installment paper from various dealers (Kantor 235, 236). By about 1968 or 1969, however, the father was no longer active, the office downtown was closed[6] and Charge Account Factors, Inc., having ceased to buy paper from other dealers, was taking only the paper from "the carpet sales" (Kantor 236). [12] Kantor recalled at a discovery hearing in early 1976 that no taxes to New York State had been paid for three or four years (Kantor 63). Official records disclose that Charge Account Factors, Inc. was dissolved by proclamation of the Secretary of State of New York on December 15, 1972 (CX 1f).

9. At the hearing here Kantor testified that he and his father, Abraham Kantor, each had had a one-third interest in the "earnings" of Charge Account Factors, Inc., and a third "partner" one Morris Wishnetsky, had had the final third (Kantor 215, 216, 234, 235). However, he omitted to explain, as shown in the transcript of his 1972

[6] Kantor testified under oath in 1972 that the address of Charge Account Factors, Inc. was by then in his father's home at 1746 Andrews Ave. in the Bronx. (CX 3g)

testimony before the Consumer Affairs Department of the City of New York, that he and his father had bought the third partner out "many years ago" (CX 3i), so that long before 1972 he and his father were the sole owners of Charge Account Factors, Inc. (CX 3j).

10. Respondent Kantor was the Secretary of the Corporation and "the active individual" therein. (Kantor 72) His father, who had never been very active in the business, was entirely inactive from about 1968 or 1969 (Kantor 236) and Kantor was "the only active person at that time" (Kantor 236). Again, as with the furniture warehouse and carpet center, respondent Kantor was responsible for the day-to-day operations (Kantor 218). Nor do respondents deny that Kanter formulated, directed and controlled the policies of Charge Account Factors, Inc., including the acts and practices challenged by this complaint. (Answer, Paragraph 1)

Respondent Charge Account Credit Corp.

11. Charge Account Credit Corp., a New Jersey corporation was chartered on November 7, 1956 (CX 1d). Like its New York chartered counterpart, Charge Account Factors, Inc., Charge Account Credit Corp.'s business was buying installment paper from various dealers (Kantor 235) but in this case it was to buy Jersey paper (Kantor 71). Its official New Jersey office was 2377 5th St., Coytesville, New Jersey (CX 1d) but its main office was always in New York City. In the early years, while respondent Kantor's father was to some extent active in the business, said office was at 29th St. & Broadway (Kantor 235, 236) but about 1968 or 1969, when respondent Kantor's father became completely inactive in the business, the office was moved to [13] respondent Kantor's own home (Kantor 236).[7] The charter of Charge Account Credit Corp. was voided for non-payment of New Jersey State taxes by proclamation on April 12, 1973 (CX 1d). Thereafter respondent Kantor, using the name Lee Woods and with his wife as a partner, registered the trade name Charge Account Credit Company with the State of New Jersey, ostensibly to liquidate the paper involved but he was still doing business under this name in New Jersey three years later at the time of the hearing (Kantor 63, 64).

12. Respondent Kantor testified at this hearing that, as in the case of Charge Account Factors, Inc., he had had only a one-third interest in the "earnings" of Charge Account Credit Corp., his father, Abraham Kantor, and another "partner," one Morris Wishnetsky, each also having one-third interest (Kantor 72, 215, 216, 234, 235). However, he omitted to explain, as shown in the transcript of his 1972

[7] Kantor testified under oath in 1972 that the office of Charge Account Credit Corp. had "for many, many years" been in his own home at 330 Windsor Road, Englewood, New Jersey.

testimony before the Consumer Affairs Department of the City of New York, that he and his father had bought out the third partner "many years ago" (CS 3i), so that long before 1972 he and his father were the sole owners of Charge Account Credit Corp. (CX 3j).

13. Respondent Kantor was the Secretary of the corporation and "the active individual" therein (Kantor 72). After his father's complete retirement from the business about 1968 or 1969, it appears that respondent Kantor was not only responsible for day-to-day operations (Kantor 218) but was "the only active person at that time (Kantor 236) and was responsible for the organization's policy (Kantor 72). Respondents do not deny that Kantor formulated, directed and controlled the policies of Charge Account Credit Corporation, including the acts and practices challenged by this complaint (Answer, Paragraph 1).

The Integrated Family Enterprise

14. The several corporations described in Findings 1 thru 3 have all come and gone but the integrated family enterprise for the sale and financing of household furnishings of which each was for a while a part remains constant under the direction and control of Lee Kantor, a/k/a Lee Woods.

[14] 15. The two corporations selling carpeting and furniture, New Rapids Furniture Warehouses, Inc. and New Rapids Carpet Center, Inc., were wholly owned by respondent Kantor and his wife (Kantor 215, 216) and his was the direction and control of each (Answer, Paragraph 1). The two corporations financing such sales (Charge Account Factors, Inc. and Charge Account Credit Corporation) were wholly owned by respondent Kantor and his father (CX 3i–j) and his was the direction and control of these parts, too, of the integrated enterprise (Answer, Paragraph 1). The corporations come and go but the underlying reality, respondent Kantor's family enterprise, endures.

16. Despite respondent Kantor's, occasional protestations on the stand that various parts of his enterprise were "separate and independent," it appears that he himself ordinarily views the carpeting, furniture, and related financing activities as a single enterprise. When estimating total dollar sales of his business in the late 1960's at about $200,000 a year,[8] he testified that "of our installment sales it (carpeting) involved 70% of the business" (Kantor

[8] Respondent Kantor claims that the gross sales of the business have fallen off badly in recent years. At an early prehearing conference (January 22, 1976), his attorney, Mr. Perlow stated:

"He's got a business that – I don't think they gross – what is your gross all together? Mr. Kantor: I couldn't tell you offhand – but it's not a hell of a lot. Mr. Perlow: Any approximation? Mr. Kantor: About $40,000 or $50,000" (Kantor 57).

215). Another time he referred to "the carpet department" of the business (Kantor 81). Of similar import was his statement that by 1968 Charge Account Factors, Inc. was taking only the installment paper from "the carpet sales" (Kantor 236).

17. Particularly significant here was Kantor's testimony while explaining his negotiation of the purchase of carpet sales "leads" in New Jersey (see Finding below) that "they (the leads) were sent to New Rapids Carpet Center — or New Rapids Furniture. . . . I don't recall, actually. It was either one or the other" (Kantor 81–82). Shortly thereafter, explaining to which company such leads would have been sent, he testified: [15]

> I really don't recall. I don't know if he (the seller) was aware of the fact that there was another corporation called New Rapids Carpet Center or not. This was a later day organization. This wasn't organized the same time as New Rapids Furniture was. He was aware of New Rapids Furniture and it would seem to me he would think of (in?) those terms (Kantor 82–83).

To the question "So he would send in these leads to New Rapids Furniture, as well as New Rapids Carpet?" Kantor answered, "Yes" (Kantor 83).

Ideal Designs, Inc.

18. Ideal Designs, Inc. (hereafter "Ideal") was a corporate retailer of carpeting for about a decade (from 1965 to 1975, when it went into bankruptcy) in Floral Park and later in Franklin Square in Nassau County on Long Island (Fisher 881–2). It was wholly owned by three "partners": Harvey Brodsky, Jules Engelson, and Marvin Fisher (Fisher 895, 897). The last testified here at the instance of complaint counsel only under compulsion of an order from the District Court for the Southern District of New York (Fisher 880, *et seq.*, 895, 897).

19. During the period of its existence Ideal had an arrangement with an advertising agency called Herb Brauner Associates (hereafter "Brauner") whereby Brauner would run TV commercials worked up by Ideal and Brauner (Fisher 887, 899) on TV and radio time bought by Brauner from New York City broadcasting stations for the use of such clients as aluminum siding marketers and swimming pool contractors as well as Ideal Designs (Fisher 897). Ideal paid nothing for this broadcast time, which was purchased by Brauner, but Ideal did pay Brauner for the customer "leads" which the commercial evoked, on a "per lead" basis (Fisher 897–898).

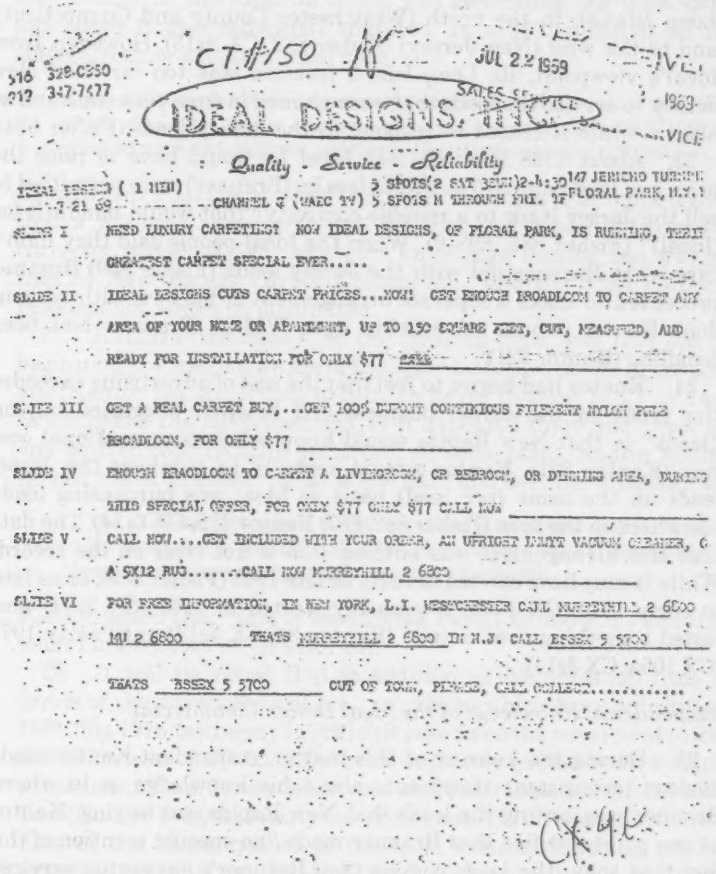
20. The format and content of Ideal's commercial, which had been worked up by Ideal & Brauner together (Fisher 899), did not vary significantly throughout the life of the arrangement, except as to

details like the precise amount of the price (*e.g.*, $77 vs. $69) or the exact amount of square footage (Fisher 883). [16]

> Q. Did you run this identical ad from the first time that you advertised?
> A. No (but) (t)hey were all very similar. In other words, there were slight variations. Sometimes we advertised instead of $77 it would have been $69. Or we changed the square footage. But basically it was the same ad. And we gave the same gifts away.
> Q. And can you tell us once again what was the period covered by these ads?
> A. The ad ran the full time we were in business, the full ten years. (Fisher 883)

This remained as true after as before the Jersey leads were sold by Brauner to Kantor (Fisher 896).

21. Complaint counsel's Exhibit CX 9b, a copy of which follows, is a fair example of the text of the Ideal commercial as it was broadcast, both before and after Kantor began buying the Jersey leads (Fisher 896): [17]



CT #150 JUL 22 1959

516 328-0350
212 347-7477

IDEAL DESIGNS, INC.

Quality - Service - Reliability

IDEAL DESIGNS (1 MIN) 5 SPOTS(2 SAT 3:30)2-4:30 147 JERICHO TURNPIKE
7-21-59 CHANNEL 4 (WNEW TV) 5 SPOTS M THROUGH FRI. IF FLORAL PARK, N.Y.

SLIDE I NEED LUXURY CARPETING? NOW IDEAL DESIGNS, OF FLORAL PARK, IS RUNNING, THEIR GREATEST CARPET SPECIAL EVER.....

SLIDE II IDEAL DESIGNS CUTS CARPET PRICES...NOW! GET ENOUGH BROADLOOM TO CARPET ANY AREA OF YOUR HOME OR APARTMENT, UP TO 150 SQUARE FEET, CUT, MEASURED, AND READY FOR INSTALLATION FOR ONLY $77 SAME

SLIDE III GET A REAL CARPET BUY,...GET 100% DUPONT CONTINUOUS FILAMENT NYLON PILE BROADLOOM, FOR ONLY $77

SLIDE IV ENOUGH BROADLOOM TO CARPET A LIVINGROOM, OR BEDROOM, OR DINING AREA, DURING THIS SPECIAL OFFER, FOR ONLY $77 ONLY $77 CALL NOW

SLIDE V CALL NOW....GET INCLUDED WITH YOUR ORDER, AN UPRIGHT HEAVY VACUUM CLEANER, O A 9X12 RUG.....CALL NOW MURRAYHILL 2 6800

SLIDE VI FOR FREE INFORMATION, IN NEW YORK, L.I. WESTCHESTER CALL MURRAYHILL 2 6800 MU 2 6800 THATS MURRAYHILL 2 6800 IN N.J. CALL ESSEX 5 5700 THATS ESSEX 5 5700 OUT OF TOWN, PLEASE, CALL COLLECT.....

CX 44

[18] 22. The Ideal commercial, as will be noted from CX 9b, included telephone numbers for viewers to call if they wanted to take advantage of the offer being made on the commercial. Broadcasts of this commercial reached such potential buyers not only in New York City but in its environs to the east (Nassau and Suffolk Counties, on Long Island), to the north (Westchester County and Connecticut), and to the west (New Jersey) (Fisher 882, CX 3z13). However, from Ideal's viewpoint, its Long Island location was too far from New Jersey to service the leads that were phoned in from that state and so after a while it ceased to respond to the Jersey leads (Fisher 884).

23. About 1968 Brauner told Ideal he would have to raise the price per lead from $15 to $18 unless he (Brauner) were permitted to sell the Jersey leads to a reliable company "that would handle it for (Ideal)" (Fisher 885, 898–9). When the Ideal people said they didn't care what Brauner did with the Jersey leads (Fisher 899) Brauner proceeded to make a separate arrangement of his own with respondent Kantor, whose advertising over WMCA Brauner had been handling (Kantor 221).

24. Kantor had begun to feel that the cost of advertising exceeded the profit in the carpet business and Brauner suggested buying "leads" so that New Rapids would know what its promotional cost was (Kantor 221). Kantor agreed verbally to purchase the Jersey leads on the same (per lead) basis as Ideal was purchasing leads elsewhere in the area (Fisher 882, 887, Kantor 222, CX 3z14). The date that this arrangement was entered into is not clear on the record. While it may have started as early as late 1968 (Fisher 885), or as late as early 1970 (CX 106b) it probably started in 1969 (CX 3z14) and lasted something over a year (Kantor 84; CX 3z13) until early 1971 (CX 106a; CX 3z14).

Respondents' Knowledge of the Ideal Design Commercial

25. During the hearing of this matter, respondent Kantor made various inconsistent statements about his knowledge as to where Brauner was getting the leads that New Rapids was buying. Kantor at one point testified that Brauner made "no specific mention of the fact that they (the leads coming thru Brauner's answering service) were Ideal Design's leads" (Kantor 224). Shortly thereafter, however, Kantor conceded that when Brauner asked if Kantor would be interested in buying leads "he (Brauner) told us that he had leads from Ideal Design. . .and later we found out that they came from other sources" (Kantor 225). We adopt as most likely Kantor's [19] subsequent testimony that Brauner told him Ideal was the advertiser and the leads being purchased were names of people who had

answered Ideal TV ads. Because of Kantor's dominant position in New Rapids Carpet Center, Inc. and the other corporate respondents, his knowledge was also theirs.

26. The record evidence of respondents' knowledge concerning the content of the Ideal ad which was generating the leads being purchased is also somewhat confused. In a 1971 affidavit on this subject, Kantor said that Ideal had:

> apparently received these names as a result of certain television advertising which offered 150 feet of continuous filament nylon carpeting for $77.00. Said price did not include delivery, padding and installation charges. (CX 106b)

Comparison with the ad itself (CX 9b) reveals this to be inaccurate in that a gift was mentioned but the price and square footage were correctly stated. Again, whatever knowledge Kantor had was also that of New Rapids Carpet Center, Inc., and the other corporate respondents, which he dominated.

27. Kantor's testimony in the hearing here was that "at the beginning" he was not aware of the representations made in the Ideal ads (Kantor 83). According to him, he never listened to TV or radio, never heard the advertisement as it appeared there and never saw any written copy (Kantor 86, 225A). At some point, Kantor testified, he had asked Brauner "what is the ad?" and Brauner allegedly said:

> The ad reads – 150 square feet of carpeting for $89.95 and – this was supposed to be uninstalled – just 150 square feet of carpeting – and for installation, you charge them the prevailing installation price. (Kantor 86)

Kantor added that "this is about what I was told about it – and this is what I knew about it" (Kantor 86).

28. It will be noted that in addition to the deviation from the terms of the advertisement (*i.e.*, no gift) to which Kantor testified in 1971, his 1976 testimony in [20] this case fixed the advertised price at $89.95 instead of $77.00. If the price originally quoted by New Rapids' salesmen to New Jersey leads was, as Kantor says, $89 for 150 square feet (Kantor 256), it is fairly inferable that Kantor's alleged unawareness of the terms quoted in the Ideal commercial could not have extended much, if any, beyond "the beginning" of the arrangement.

29. Even the $89 price, not being in accordance with the Ideal commercial, according to Kantor, elicited protests from New Jersey leads, who had heard the price was $79 ($77?). As a result New Rapids' price was reduced to $79 ($77?) he testified (Kantor 238, 256, 257; see also 232, which may refer to this episode).

30. It was allegedly two or three months after Kantor started answering the Jersey leads before he found out from customers

complaining to his salesmen Kantor says, that the Ideal commercial contained an offer of a free gift (CX 3z18). He was "dumbfounded" when demands for such gifts were made and promptly called Brauner, who confirmed that that was what the ad said but explained that the offer was "innocuous" (CX 3z18) because it applied only if the viewer bought precisely what was offered on the commercial (*i.e.*, the $79 or $89 package) and Ideal could supply Kantor with one or two of the advertised vacuum cleaners in case he ever needed them (Kantor 238, 239, 240).

31. However, Kantor could never get any vacuum cleaners or even the name of Ideal's source of supply (Kantor, CX 217). Accordingly, he adopted a suggestion by his salesmen that New Rapids substitute a different gift, to wit, a free reinstallation of the carpet purchased, in case the customer were to move to a new home within the next year (Kantor 238, 240). With this explanation, Kantor asserted, it could fairly be said that there was no situation where New Rapids did not supply a promised gift (Kantor 238).

32. The foregoing findings make it clear that respondent Kantor and through him the corporate respondents he dominated were substantially aware of the basic terms (price and square footage) of the Ideal TV commercial almost from "the beginning" of the arrangement and at least after the first two or three months of an arrangement that lasted over a year, were similarly aware of the same commercial's promise of a free gift. [21] Accordingly, it is found that respondents were aware of the key terms of the commercial during most of the time they were responding to the New Jersey leads which said commercial evoked.

Alleged Buyer Confusion of New Rapids and Ideal

33. Upon receipt of each name from Brauner respondent Kantor would arrange for one of his two New Jersey commission salesmen to communicate with the prospective customer and seek an order for carpeting (CX 106c & d). Sometimes, however, Kantor would call such leads preliminarily himself (Kantor 252).

34. When Kantor made such preliminary calls, he testified, he not only avoided mention of any connection with Ideal Design or even that Ideal was the source of the lead but "in every case" affirmatively told the lead that "we are not the people that advertised" (Kantor 253, 254). The claim of affirmative disclosure that "we are not the people that advertised" is somewhat at variance with testimony which Kantor gave the City of New York Department of Consumer Affairs in 1972:

Ms. Sullivan: Did you say that you were not from Ideal Designs?
Mr. Kantor: Well, we said, "we understand that you're interested in carpeting," that's the way we started. (CX 3z15, CX 3z16, referred to at Kantor 253)

In light of this inconsistency, we do not credit Kantor's assertion that he made an affirmative disclosure to New Jersey leads that his company was not the same one that advertised. It is further found that failure to mention Ideal by name when saying "we understand that you're interested in carpeting" may have left the customer, initially, at least, believing he was dealing with an Ideal representative.

35. Despite this potential for some confusion inherent in respondent Kantor's failure adequately to disassociate New Rapids from Ideal in his approach to the New Jersey leads, the consumer testimony here revealed relatively little such confusion. Only two witnesses out of many witnesses and affiants testified that a New Rapids salesman said he worked for both New Rapids and Ideal (Crute 556, 557; Beard 571). Our attention has been drawn to no evidence that any other lead thought [22] New Rapids was Ideal or somehow represented Ideal.[9] Accordingly, the two cases cited are found insufficient to support the complaint's allegation in Paragraph 12–1 that it was a "practice" of respondents' salesmen to tell questioning purchasers that they worked for both New Rapids and Ideal.

Bait and Switch Tactics

36. The price advertised in the Ideal Design TV commercial for 150 square feet of continuous filament nylon carpeting,[10] whether $77 or even $89, represented a "substantial" reduction from the price regularly charged by New Rapids Carpet Center, Inc.[11] (Kantor 260). The addition of the advertised gift (either an upright vacuum cleaner or a 9' x 12' rug) would have made such an offer cost more than the company's profit on the sale (Kantor 240). Kantor conceded in a 1972 hearing before the New York City Department of Consumer Affairs that he was not, in fact, "in a position" to offer the free gift that Ideal was advertising (CX 3z17).

37. The evidence of consumer witnesses and affiants leaves little question but that the real purpose of respondents in purchasing

[9] In two cases a lead mistakenly thought New Rapids had also been the advertiser (Cipriani 508; Tomaro 709).

[10] The commercial's reference to continuous filament "pile" carpeting is a mistake of some sort. As explained by respondent Kantor at the hearing, pile (sheared filament) cannot be continuous filament; the terms are mutually inconsistent (Kantor 261).

[11] This uncontested evidence that the TV ads' "special" price was substantially below New Rapids' regular price for similar carpeting, while tending to support a bait and switch charge, at the same time disposes of the allegation of Paragraph 11–3 of the complaint that this carpeting was actually sold at the "usual and customary" retail price for respondents' merchandise. It clearly was not and such is our finding.

Brauner's New Jersey leads was not to sell the advertised goods at the advertised price. The real purpose, it is found, was to use the low, low price and gift offer in Ideal's TV commercial merely to get a foot in the door and then, by disparagement and invidious comparison, to switch the New Jersey leads over to a much more expensive substitute.

[23] 38. A pattern of disparaging New Rapids' "special" offer and persuading the Jersey leads to switch to a much more expensive substitute is documented in this record by a substantial amount of evidence. Four witnesses told their stories at some length and 21 affiants corroborate the picture which emerged from the witnesses' testimony.

39. Witness Cipriani was led to buy $400 worth of substitute carpeting by the New Rapids salesman's disparagement of his own $77 "special":

> When he (the New Rapids salesman) got to my house he told me it was ridiculous to think that they would carpet three of those size rooms under that price, because they were too big. (Also?) the carpeting that was. . .advertised was of a lower grade and I would probably want something a little heavier for the traffic and everthing. So naturally I chose a better grade carpeting. (Cipriani 511, 520)

40. Witness Crute was led to buy $500 worth of substitute carpeting by the New Rapids salesman's disparagement of his own $77 "special":

> A man came to my house, a representative, with the carpeting for $77. The carpeting that he showed me for $77 was really - and also the salesman downgraded the carpeting himself.
>
> * * * * * * *
>
> He was telling me it was no good, you know. This wasn't worth putting in (down?) and he had some better carpeting he could show me which was a little bit more money and which he did. . . (Crute 556)

41. Witness Beard's purchase of over $580 worth of substitute carpeting was effected by similar disparagement of the salesman's own "special":

> Well, he came and he showed the carpet that he had. The carpets that he had that he showed me for $77, you know, weren't nice. He admitted himself that they weren't fit.
>
> * * * * * * *
>
> [24] He said that they weren't - you know - they just weren't fit either for $77 to put down in your home.
>
> * * * * * * *

So, in turn, of course, he had – you know – other carpets, so naturally I looked at the better carpet. So I also did buy the better carpet. (Beard 572)

42. Witness Tomaro was similarly led to buy $148 worth of substitute carpeting by a salesman's disparagement of his own $77 "special":

(T)he carpet was guaranteed longer and it was a better make than – because he told me the one that's advertised in television he can only guarantee it for one year.

* * * * * * *

He volunteered it (this information).

* * * * * * *

The only thing that made me change my mind was that I wasn't going to get a carpet for $77 and next year I have to turn around and put another carpet there for $77 and keep on going one year after another.

* * * * * * *

If they only guarantee it for one year, I figured it's less. (Tomaro 803, 804)

43. Many affiants confirm that the bait and switch tactics described by the above four witnesses were not isolated or untypical acts and, at the same time, illustrate the variety of ways employed by New Rapids' salesmen to achieve the desired result. Sometimes the affiant simply states that the salesman "downgraded" or "degraded" the $77 carpeting special: Scavone, CX 30a & b (up to $350); Ransom, 29a (up to $650); Smith, CX 32a (up to $350) and Mordicai, CX 23a (up to $175). Sometimes it appears that the salesman attached specifically the $77 carpet's quality: Ronan, CX 84 (up to $150); Manning, CX 22a (up to $200); Hughes, CX 36a (up to $506); or durability: Champion, CX 16 (up to $495); Doloszycki, CX 11 (up to $138); or called it "cheap" or "for cheap people": Enna, CX 17(up to $173); Schuman, CX 31a (up [25] to $354). Sometimes the salesman carried unattractive samples of the special: Nelson, CX 38a & b (up to $600) or samples of the substitute carpet only: Nann, 39a (up to $559). Sometimes the $77 special was simply said not to be available: Myers, CX 24a (up to $495); Hill, CX 35a (up to between $270 and $370); Baskerville, CX 33a (up to $551); Smith, 41a (up to $723). One salesman pointedly ignored the special: Flor, CX 19a (up to $373). One "advised against" buying the special, apparently successfully: Ferrara, CX 18a (up to $600). In only one case reviewed did the salesman meet such determination to buy the $77 special that the lead could not be talked out of it. New Rapids solved this novel problem by never

making delivery of the order. O'Grady, CX 25a & b (purchased for $92, including incidental charges).

44. No significant infirmities in any of this evidence is apparent and no rebuttal evidence was tendered. Accordingly, it is found that New Rapids Carpet Center, Inc.'s salesmen made no use of the Ideal Design leads except to get their feet in potential customers' doors, after which they promptly disparaged the $77 offer and commonly succeeded, instead, in selling such customers substitute carpeting at prices many times higher than the Ideal TV commercial had advertised. It must be inferred from the extent of the practice that this was all done pursuant to a plan by respondent Kantor and the respondent corporations dominated by him to use the Brauner leads for just such bait and switch purpose rather than to obtain customers by actually selling carpeting at the bargain price advertised by Ideal.

Free Gift

45. The Ideal TV commercial included a promise of a free gift – either a stand-up vacuum cleaner or a 9' x 12' rug – to anyone taking advantage of the advertisement's principal offer: 150 sq. ft. of continuous filament nylon carpeting for $77 (CX 9b). The cost of a vacuum cleaner, however, was enough to make the offer unprofitable for respondents if they should attempt to carry out these terms literally (Kantor 240).

46. To minimize this expense Kantor was advised by Brauner to take the tack that no-one was entitled to a gift unless he bought the $77 "special" on the advertised terms (CX 3z18). Since most buyers were talked out of the "special" by New Rapids' salesmen, the burden of giving away rugs or vacuum cleaners (or a free re-installation, which Kantor says he added in place of [26] a vacuum cleaner, 238, 240) should not have been burdensome. However, while New Rapids never openly repudiated the general promise of a gift, it made successful use of many expendients to avoid giving such gifts away, as the record here reveals.

47. Witness Crute understood from the Ideal TV commercial that there would be a gift if she ordered three rooms of carpeting (as she did) but she didn't think to mention this at the time and the salesman never mentioned it either. She never received one and didn't know why. (Crute 558).

48. Witness Beard was told by her New Rapids salesman that if she bought the better carpet he was offering she would receive a gift. She bought the carpet and asked for the gift but she never received anything and didn't know why. (Beard 572).

49. Witness Tomaro testified that the TV ad offered a free gift of a

vacuum cleaner or a 9' x 12' rug (Tomaro 779) and the salesman who responded to his phone call promised the vacuum cleaner, but Tomaro never received it (Tomaro 778). Four or five months later, when he complained about this to New Rapids' lawyer, the latter said "I'll look into it" but that was the last Tomaro ever heard from the lawyer or the company or anybody on that subject (Tomaro 782, 783).

50. That Kantor's various ways of avoiding the gift promised on Ideal's TV ad were not limited to a few such instances is confirmed by a number of affidavits in evidence here:

Doloszycki, CX 11a&b	(TV promise of gift disparaged by salesman who promised "better deal" with other carpeting)
Champion, CX 16b	(salesman promised free carpet sweeper; never delivered despite many protests)
Ferrara, CX 11b	(salesman disparaged vacuum cleaner so elected to take 9' x 12' rug; promise always confirmed but never honored)
[27] Manning, CX 22b	(salesman promised either vacuum cleaner or 9' x 12' rug but neither ever received)
Scavone, CX 30a&b	(per TV ad, bought carpeting and selected vacuum cleaner as free gift but never received gift, despite repeated company assurances it would be forthcoming)
Baskerville, CX 33a&b	(per TV ad, when carpeting purchased asked for free vacuum cleaner, which salesman promised; never received despite subsequent promise by company it would be shipped)
Hill, CX 35a&b	(at time of carpet purchase salesman confirmed TV promise of free vacuum cleaner with carpet; never delivered)

Rentas, CX 40a	(TV offered free vacuum cleaner or 9' x 12' rug with carpet purchase; salesman disparaged rug and promised vacuum cleaner with carpet; never delivered despite repeated promises by company)

51. No significant infirmities in this evidence are apparent and no rebuttal evidence was ever tendered. From the substantial number of omissions by respondents to deliver the free gifts offered on the Ideal TV commercial, even though this expectation was commonly confirmed by respondents' own salesmen and even though an obligation to deliver in such cases was never denied by the respondents, it is found that such omissions were a regular practice of the business.

COUNT II

Miscellaneous Incidental Marketing Practices

52. Count II of the complaint supplemented the main charges of Count I (bait & switch, free gift) with additional allegations of miscellaneous other marketing practices by respondents which apparently came to the Commissions's attention as an incident to the main investigation. Apart from two unfair practices apparent on the face of New Rapids Carpet Center's executed contracts, the charges recited in Count II seem to have been tacitly abandoned and/or inadequately briefed.

[28] 53. Par. 16–1 charges the use of high pressure selling tactics. Complaint counsel's pretrial brief (at page 9) anticipated producing consumer witnesses and affiants "who tried to cancel within a day or a few days after execution of the contract but without success" and were thereafter sued for payment. If such evidence was produced the Administrative Law Judge has no memory of it and complaint counsel's proposed finding (#22) makes no reference to such evidence, relying rather on a "contention" of complaint counsel that respondents' customers "might well have cancelled within a reasonable time afterward had they been given adequate opportunity to consider . . ." Accordingly, the request for a specific finding of high pressure selling is declined, although without prejudice to entry of a cooling-off order insofar as the facts found here are sufficient in themselves to justify such an order.

54. Paragraph 16–2 charges that it has been the practice of respondents' salesmen to write on the face of carpeting purchase contracts a purported "guarantee" (*e.g.* "8 year wear guarantee" or

"10 year wear guarantee" or "12 year wear guarantee") so vague as to be deceptive. That this was, in fact, a usual practice was well established by certain witnesses (Porter 538, Beard 573–575) and confirmed by a large number of executed contracts in evidence. (See the CX 55 series of contracts, particularly b, c, h, k, m, n, r, s, t, u, v, w, x, y, z, z1–15 and z17–19.)

55. It is further found that such a guarantee (*e.g.* "8 year wear guarantee") fails to disclose adequately (1) the nature and extent of the guarantee, (2) the conditions and limitations on the guarantee, and (3) the manner in which the guarantor will perform and is therefore unfair.

56. However, the further allegation of Paragraph 16–2 of the complaint that in a substantial number of instances the respondents have not performed under the implied terms and conditions of the guarantee is a complex question not well adapted to resolution in the present litigation and, perhaps for that reason, apparently abandoned by complaint counsel. In any event the non-performance charged is not found to be a fact.

[29] 57. Paragraph 16–3 of the complaint charges that in a substantial number of instances respondents have forced substitution or have tried to force substitution of carpeting which was used or soiled or varied in quality or color from that ordered and Paragraph 16–4 goes on to charge wrongful institution of lawsuits to effect payment in such cases. So far as we can tell from complaint counsel's proposed findings of fact these charges have completely abandoned. In any event we are pointed to no evidence supporting such charges and, accordingly, they are not found to be a fact.

58. Paragraph 16–5 of the complaint charges that, when writing up carpeting sales contracts, respondents salesmen have stated neither the yardage nor the price per yard but have merely referred to carpeting and total cost, thus depriving customers of opportunity to check the amount of carpeting or to compare unit costs with those charged by respondents' competitors.

59. It appears that one of the New Rapids Carpet Center purchase form contracts in evidence here (CX 55a thru CX 55z19) did not even contemplate statement of the amount of carpeting purchased. The other form contracts in evidence here (CX 55z20 thru CX 55z34) contain a blank space to enter "quantity" but the executed forms show no example of such entry.

60. None of these contracts, of either kind (CX 55a thru CX 55z34) reveals either an entry or a place to enter the unit (per yard) price of the carpeting purchased. It is found that the combination of these

omissions made in practically impossible for the buyer to make more than a very rough price comparison with competitive carpeting.

COUNT III

Inconvenient Venue

61. Many New Jersey purchasers of carpeting from respondent Kantor and/or his sales corporations (including many of the customers attracted by the Ideal TV commercial), have been sued for the alleged purchase price or deficiencies in payment or on other grounds by such corporation or an affiliated finance company to [30] whom the related installment purchase contract has been transferred. Such suits have frequently been brought in New York City's Civil Court, even though the sale out of which such alleged causes of action arose was made in New Jersey to a New Jersey citizen who could not, merely by virtue of such purchase, be deemed to do business in New York under New York's so-called "long arm" statute. It may fairly be inferred that the purpose of invoking such improper venue has been to facilitate obtaining default judgments and thus avoid a fair adjudication of the facts. The evidence in support of this complex finding is summarized in TABLE I, whose underlying supports are as follows.

62. A survey of suits which were brought by respondents here against New Jersey residents in the Civil Court of the City of New York during the period from 1/1/69 to 6/21/71 was made by a law clerk, one Laidman for the Newark Essex Law Reform Project. His statistical affidavits (CX 6a-k and CX 7a-j) summarizing his findings, which are of a purely routine, clerical nature, are specifically found to constitute reliable hearsay evidence of judicial records, individual copies of which would unquestionably constitute admissible evidence in any court.

63. Laidman's survey reveals a total of 175 such suits. That a large number of the New Jersey residents named as defendants in such suits were customers of respondents who had bought carpeting in New Jersey and had nothing to do with New York is established by reference to the live testimony of five such defendants, supplemented by the affidavits of 30 more such defendants.

64. That a common result (and thus, inferably, a purpose) of respondents' suits against New Jersey residents in New York has been to obtain default judgments is shown by the high proportion of such suits which resulted in a default.

65. The evidence supporting both these findings may be summarized as follows:

[31] TABLE I

N.J. Resident	Laidman Reference	Transcript or Affidavit Reference	Sale Made in N.J. Reference	Purchase Cost	Ad damnum or default judgment	N.J. residents denial of service of process (reference)	Suit filed (S) Default Judgment (D) in N.Y.
Witnesses							
Cipriani	CX 6h	505–528	514	$400.00	$261.20	514	(S)
Beard (Gilbert)	CX 6h	569–588	576	$580.00	$90.98	587	(S)
Porter	CX 7f	532–554	541	$653.00	$952.20	541	(D)
Tomaro	CX 7f	776–809	781	$148.00	$143.85	786	(D)
Crute	CX 7i	555–568	558	$500.00	$695.61	559	(D)
Affiants							
Doloszycki	CX 7g	CX 11	11c	$138.02	$164.47	11c	(D)
Casler (Caster)	CX 7e	CX 15	15c	$300.00	$252.17	15c	(D)
Champion	CX 7h	CX 16	16a,c	$495.43	$647.58	16d	(D)
Enna (Emma)	CX 7e	CX 17	17a,c	$173.04	$277.79	17c	(D)
Flor	CX 6g	CX 19	19c	$372.86	$329.97	19b	(S)
O'Grady	CX 6e	CX 25	25b	$92.00	$138.35	25b	(S)
Parker	CX 7e	CX 26	26b	$182.46	$208.67	26b	(D)
Pickett	CX 7f	CX 27	27a,b	$811.64	$1199.60	27c	(D)
Schuman	CX 6e	CX 31	31a,c	$354.00	$354.00	Summons rec'd (31b)	(S)
Gass	CX 7c	CX 34	34a,b	$700.00	$1126.18	34b	(D)
Hill	CX 6e	CX 35	35a	$270–$370	$290.05	Summons rec'd (35c)	(D)

[31] TABLE I — Continued

N.J. Resident	Laidman Reference	Transcript or Affidavit Reference	Sale Made in N.J. Reference	Purchase Cost	Ad damnum or default judgment	N.J. residents denial of service of process (reference)	Suit filed (S) Default Judgment (D) in N.Y.
Affiants — Continued							
Hughes	CX 6g	CX 36	36a,b	$506.76	$582.00	36f	(S)
Lewis	CX 6g	CX 37	37a,c	$400–$500	$303.37	37c	(S)
Melson	CX 6f	CX 38	38b,d	$600.00	$317.88	38e	(S)
Nann	CX 6f	CX 39	39b,c	$558.60	$664.40	39c,d	(S)
Rentas	CX 7g	CX 40	40b	$599.46	$1068.18	40c	(D)
Sutton	CX 7d	CX 42	42b,c	$450.00	$751.12	42c,d	(D)
Moultrie	CX 7f	CX 52	52a,c	$700.00	$1253.10	Summons rec'd	(D)
[32] Addison	CX 7d	CX 14	14a	not given	$642.80	14b	(D)
Ferrara	CX 6i	CX 18	18a	$600.00	$1387.07	18c	(S)
Hamilton	CX 6e	CX 20	20a	$400.00	$457.80	Summons rec'd (20b)	(S)
King	CX 7h	CX 21	21a	$634.00	$965.18	21c	(D)
Manning	CX 7c	CX 22	22a	$200.00	$102.14	22c	(D)
Mordecai	CX 7f	CX 23	23a	$175.00	$151.82	Summons rec'd (23b)	(D)
Myers	CX 6e	CX 24	24a	$495.60	$495.60	24c	(S)
Ransome	CX 7d	CX 29	29b	$650.00	$808.68	Summons rec'd	(D)
Scavone	CX 7d	CX 30	30b	$350.00	$482.60	30c,d	(D)
Smith	CX 7d	CX 32	32a	$350.00	$485.93	32b	(D)
Baskerville	CX 7h	CX 33	33a	$551.00	$850.21	33c	(D)
Smith	CX 6e	CX 41	41a	$723.45	$723.45	41b	(S)

[33] 66. The foregoing finding that in 175 cases respondents sued New Jersey residents on New Jersey contracts in the City Court of New York City is corroborated by a determination of Hon. Edward Thompson, Administrative Justice of that Court on May 24, 1973, that 181 such actions (brought by respondents against New Jersey residents) must be set aside and dismissed and all judgments entered therein must be vacated (CX 95a-f) because of improper venue and resultant denial of due process of law developed before Justice Thompson during a hearing on January 16, 1973, (CX 93a–z59), (See particularly Justice Thompson's final finding at CX 93z55 and CX 93z56:

> I am convinced beyond a shadow of a doubt that each and every one of those judgments and/or summonses . . . should, in the interest of justice be vacated or dismissed. . . . Due process has not even been waved before the eyes or the ears of the average witnesses who have testified. . .)

"Sewer Service"[12]

67. The data appearing in the last two columns of the table incorporated in Finding #65 which is entitled "TABLE I" reveals that in most of respondents' "long arm" suits against New Jersey customers in the Civil Court of the City of New York (whether or not such suit had yet eventuated in a default judgment) the consumer-defendants denied that they had ever been served with process or had otherwise learned (except from FTC or other investigators) that they had been sued in New York or that a default judgment had been taken against them there.

[34] 68. The evidence of "sewer service" and default judgments turned up by the Laidman study related only to New Jersey residents sued in New York. However, other evidence confirms that arranging for "sewer service," thereby obtaining default judgments against customers has been a common practice of respondents in their suits generally, not merely those against New Jersey residents.

69. One Novack, an attorney employed by the New York Regional Consumer Protection Council, headed a survey of actions brought by respondents against New York City residents between (January) 1969 and (May) 1972 (CX 56a). Her statistical findings, embodied in worksheets (CX 57) and summarized in a statistical affidavit (CX 56) reveal that respondents took about 22 default judgments against New Yorkers during that period.

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[12] "Sewer service," as used in the complaint here was defined by complaint counsel:
"It's a common word used around this area for a process server who has ostensibly made personal service upon a defendent in accordance with the law when in fact he never made such personal service. The term "sewer service" means that the summons is actually put into the sewer rather than served in accordance with the law" (Koch 199).

70. Although the court records in almost all of these cases show a proper return of service of summons and complaint (CX 56b thru CX z9), that there must have been some deficiency in the notice given defendants in such actions seems almost certain in light of the large number of defaults found. Using the Novack summary of default judgments (above), Commission investigators set out to determine how many, if any, of the judgment debtors were really served with process, as shown on the records of the Civil Court of the City of New York.

71. Affidavits obtained from 13 such judgment debtors, establish (1) that the alleged debt in each case arose out of a purchase of carpeting or furniture from respondents and (2) that the judgment debtor in each case denied that any process had ever been served on him. Table II summarizes these findings:

[34a] TABLE II

Name of New York Resident	NOVACK Reference	Judgement Debtor's Affidavit	Debt related to carpet or furniture purchase	Service of process denied by debtor
1. Kellam	57z56	CX 77	77a	77d
2. Michael	57z78	CX 79	79a	79b
3. Neuer	57z85	CX 80	80a	80d
4. Pena	57z91	CX 81	81a	81b
5. Prieto	57z94	CX 82	82a	82b
6. Robinson	57z101	CX 83	83b	83c
7. Ronan	57z108	CX 84	84b	84d
8. Alexander	57d	CX 86	86a	86b, c
9. Coleman	57z28	CX 88	88a	88c
10. Douglas/Person	57z19	CX 89	89a	89c
11. Elsey	57z21	CX 90	90a	90b
12. Gaines	57z31	CX 91	91a	91c
13. Jones	57z52	CX 92	92a	92c

[35] 72. Complaint counsel also urge us to make use of affidavits by Commission investigators showing that in an additional 18 cases such investigators were unable to locate New York judgment debtors identified by the Novack study and that from what the investigator learned at the recited place of service it would have been impossible for the debtor to have resided there because the building had previously been torn down or the debtor had never been heard of in such building or had moved before the date of service or for other similar reasons. (CX 58 thru CX 74)

73. We decline to attach any weight to such evidence because it

plainly involves multiple hearsay from unknown sources whose reliability cannot be weighed properly. It is found, however, from the affidavits of the purchaser-defendants themselves (which we deem sufficiently reliable for this purpose) that in many of respondents' collection suits against New Yorkers in the Civil Court of the City of New York the service of process shown on the records of that court was falsely returned and we further find that such false return by the process server in most cases was entered by respondent Kantor or his employees, who served much of respondents' process. (Kantor 267–270)

COUNT IV

Truth in Lending

74. Respondents regularly arrange for the extension of consumer credit, as the phrases "consumer credit" and "arrange for the extension of consumer credit" are defined in the Federal Reserve Board's Regulation Z, the implementing regulation of the Truth in Lending Act. (Cipriani, 521; Porter, 537) In connection with their credit sales, as "credit sales" is defined in Regulation Z, respondents have required their customers to enter into contracts for the sale of respondents' goods. (Crute, 557; CX 10d; Beard (Gilbert) 573; CX 47c)

75. Sixty-one contracts entered into by respondent New Rapids Carpet Center, Inc., and its consumer-contractors, (who are identified in the contracts) are found on one or the other of two pre-printed contract forms. (CX 55a thru CX 55z34) Such cost and financing information as was offered the consumer appears on these contracts.

[36] 76. One of these two pre-printed contract forms (see contracts numbered CX 55a thru 55z19) used both before and after July 1, 1969 (the effective date of the Truth in Lending Act) fails to disclose the following:

(1) The amount of the finance charge, as required by Section 226.8(c)(8) of Regulation Z.

(2) The annual percentage rate, computed in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

(3) The amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments, as required by Section 226.8(b)(4) of Regulation Z.

4. Identification of the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation, as required by Section 226.8(b)(7) of Regulation Z.

77. The same pre-printed contract form (CX 55a thru CX 55z19) uses the terms "contract," "deposit," and "net," instead of "cash

price," "cash downpayment," and "unpaid balance of cash price" respectively, when describing the difference between the cash price and the total downpayment, as required by Section 226.8(c)(1), (2), and (3) of Regulation Z.

78. The same pre-printed contract form (CX 55a thru CX 55z19) did not have a space provided for the "deferred payment price" (which is defined as the sum of the cash price, the finance charge, and all charges which are included in the amount financed but which are not part of the finance charge), as prescribed by Section 226.8(c)(8)(ii) of Regulation Z.

79. The same contract form (CX 55a thru CX 55z19) contains no blank spaces for required disclosures, including the finance charge, the annual percentage rate of interest, the amount or method of computing late charges, [37] or the penalty for prepayment. Nor was such information hand written by the salesmen on any of the 44 such contracts in evidence here. The financial information which was provided to respondents' customers was written in a small box approximately two inches square, at the bottom of the front page of this contract. Even if fully completed by the salesman, such box of information could not have provided financial disclosure which was clear, conspicious, or in a meaningful sequence, as required by Section 226.6 of Regulation Z.

80. At various times after July 1, 1969, the effective date of the Truth in Lending Act, respondents used another type of pre-printed contract form (see CX 55z20 thru CX 55z34) which, when completed properly, as appears generally to have been the case, contained the information and terminology necessary for compliance with Regulation Z. However, in a number of instances after July 1, 1969, as listed below, respondents continued to use the older contract forms for contracts providing for more than four installment payments (the regulatory minimum until 10/28/75) and did not alter them to make the required disclosures.

Consumer	*Contract*	*Contract Date*
Anthony	CX 55a	1/13/70
Clifton	CX 55f	2/28/70
Davis	CX 55i	10/11/70
McFaddon	CX 55y	3/30/70
Mari	CX 55z	9/11/70
Rouse	CX 55z10	3/20/70
Taylor	CX 55z16	11/22/70

Interstate Commerce

81. Respondents in their joint Answer do not deny any of the allegations of Paragraph 4 of the complaint concerning interstate commerce. Accordingly it is found, as alleged in the first section of Paragraph 4 of this complaint, that:

> Respondents New Rapids Carpet Center, Inc. and Lee Kantor, individually and as General Manager of New Rapids Carpet Center, Inc., are now, and have been for some time last past, engaged in business as a retailer of [38] carpets, and respondent Lee Kantor, both individually and doing business as New Rapids Furniture Warehouses, Inc.,[13] is now, and has been for some time last past, engaged in business as a retailer of furniture, major appliances and carpets, all of the said respondents offering for sale and selling their respective products to the consuming public on a cash or credit basis. Respondents sell and ship their products from New York State to purchasers located in other States of the United States. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce as "commerce" is defined in the Federal Trade Commission Act.

82. It is further found, as alleged in the second section of Paragraph 4 of the complaint that:

> In the course and conduct of their business in connection with sales made on credit, respondents New Rapids Carpet Center, Inc. and Lee Kantor assign or transfer their installment sales contract paper, which each of said respondents secure from purchasers of their respective products, to their two affiliated companies, respondents Charge Account Credit Corp. and Charge Account Factors, Inc., for collection purposes only.

[39] 83. It is further found, as alleged in the third section of Paragraph 4 of the complaint that:

> In furtherance of their collection objectives, respondents Charge Account Credit Corp. and Charge Account Factors, Inc. currently and for some time last past have issued coupon payment books to the aforesaid purchasers, many of whom are residents of the State of New Jersey, have used the facilities of the United States mail to solicit and obtain payments from said purchasers, and have used the facilities of the courts of the State of New York to sue residents of the State of New Jersey. In connection with the foregoing activities, respondents Charge Account Credit Corp. and Charge Account Factors, Inc. maintain and at all times mentioned herein have maintained, a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

84. It is further found, as alleged in the fourth section of Paragraph 4 of the complaint that:

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[13] In their answer to Paragraphs 1 and 2 of the complaint, respondents formally denied that respondent Kantor has been doing business individually as New Rapids Furniture Warehouses, Inc. since that corporation was dissolved. (For legal theory, see TR 142.) However, we do not understand this to constitute a denial that the business carried on by Kantor, whether under his own name or the corporate typle, is and has not been engaged in interstate commerce.

As an integrated operation, all of said respondents referred to in this Paragraph Four, in the course and conduct of their aforesaid business, and at all times mentioned herein, have been, and now are, in substantial competition, in commerce, with corporations, firms and individuals in the offering for sale, and sale, of furniture, major appliances and carpets and other products of the same general kind and nature as that sold by said respondents and in the collection of monies allegedly due in connection therewith.

85. The parties' agreement on the correctness of these jurisdictional facts is corroborated by the evidence of record here. The charges of Counts I & II (bait and switch, free gift and miscellaneous marketing tactics) concern selling leads called from New Jersey in response to television advertising broadcast from New York to New Jersey and the ensuing acts and practices of a New York retailer in the course of soliciting sales, [40] entering into purchase contracts and delivering carpeting in New Jersey. Count III concerns the impropriety of out-of-state venue in litigation growing out of such interstate sales and financing contracts incidental thereto. [Count IV, concerning truth in lending, requires no showing of engagement in interstate commerce.]

Conclusions of Law

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over all respondents.

Comment: Jurisdiction over the subject matter here is found in Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a) and, with respect to Count IV, under Section 108 of the Truth in Lending Act, 15 U.S.C. 1607. All respondents appeared generally by attorney.

2. The acts and practices charged in the complaint and proved here took place in commerce, within the meaning of the Federal Trade Commission Act, except that no finding concerning engagement in commerce is made as to acts and practices charged under Count IV.

Comment: Engagement in interstate commerce within the meaning of the Federal Trade Commission Act, 15 U.S.C. 44, was not denied by respondents in their joint Answer to the complaint and was confirmed by evidence summarized in Findings #81–85. The Truth in Lending Act authorizes this Commission to seek cease and desist orders against violators of the Act without reference to engagement in or effect on interstate commerce. 15 U.S.C. 1607(c).

3. Respondent Lee Kantor, a/k/a Lee Woods, was the organizing, controlling and actively directing force in each of the respondent corporations and in New Rapids Furniture Warehouses, Inc., another affiliate, while said corporations existed. All of them together [41] with Kantor in his past and present capacity as an individual businessman, have constituted an integrated family enterprise which Kantor has always dominated and whose acts and practices, including those found here, he has always personally formulated, directed and controlled.

Comment: Although carefully maintaining record denials of virtually all substantive allegations of the complaint throughout this proceeding, respondents in their "Proposed Findings Of Fact And Conclusions Of Law" seem in the end to place almost exclusive reliance on their principal contention, to wit, that respondent Kantor did none of the things charged here in his *individual* capacity and thus presumably cannot be saddled with a cease and desist order properly directed to the corporations for whom he worked. The facts do not support such a conclusion.

In the first place, the last of the corporations involved was dissolved some three years ago, yet respondent Kantor has continued to carry on substantially the same business as in days of yore. His counsel argues (Tr. 142) that under New York law *de facto* corporations have continued to exist after dissolution of the *de jure* ones and that Kantor must be viewed as still a mere corporate employee without liability for these corporations' acts and practices. We do not pause to consider whether such would, in fact, be the result of a proper application of state law, because this case is governed in such matters by the federal law and the law of this Commission in particular. *Spiegel, Inc.*, 86 F.T.C. 425, 445 (1975).

On the question of individual responsibility for the unfair trade practices of corporations in interstate commerce a very considerable body of law has grown up and is dispositive here. The better authorities hold that an individual [42] participant can be held responsible for the acts and practices of a corporation – even a closely held family corporation such as those involved here – merely on the basis of his domination of corporate affairs *generally* ("formulates, controls and directs policies" is the usual phrase). *Tractor Training Service, et al.* v. *FTC*, 227 F.2d 420 (9th Cir. 1955). Other cases hold that there must be a further showing

that such individual actually participated in the challenged acts and practices.[14] *Coro, Inc., et al.* v. *FTC,* 338 F.2d 149, 154 (1 Cir., 1964) cert. den. 380 U.S. 954.

But this distinction is of no import here because respondents did not deny in their Answer that respondent Kantor has dominated each of the respondent corporations both generally and with reference to the specific acts and practices charged here. They could hardly have done otherwise. His general dominance of the respondent corporation and their affiliate, New Rapids Furniture Warehouses, Inc., as well as of the integrated family enterprise which they together made up was clearly established by the evidence here. The corporations were really one and that one was Kantor. Moreover, his central position in virtually everything respondents ever undertook and in all the things they are charged with doing was just as clearly demonstrated. In light of all this evidence respondents' principal if not sole defense – no individual responsibility for corporate acts – cannot be accepted.

[43] 4. While engaged in the offering and sale of carpeting and other household goods at retail out of a small furniture warehouse in the Bronx (New York), respondent Kantor, individually and through the various corporations of the integrated family enterprise he has dominated and controlled, has engaged in unfair methods of competition and unfair acts and practices in commerce, including the following:

(a) He arranged to receive leads from a TV advertisement of a bargain price for carpeting, not to sell the advertised carpeting (which his salesmen immediately disparaged once they could get into customers' homes), but to switch these leads to buying much more costly carpeting, as was, in fact, almost always what happened.

Comment: "Bait and switch" is too common a commercial practice and its unfairness is too well settled to require more than cursory comment. The Commission's "Guides Against Bait Advertising" prohibit it and define it as follows:

> Bait advertising is an alluring but insincere offer to sell a product or service which the advertiser in truth does not intend or want to sell. Its purpose is to switch consumers from buying the advertised merchandise, in order to sell something

[14] It is fair to say that while this Commission has continued to align itself in theory with the general domination school the facts on which its decisions have rested, at least since *Coro,* have almost always revealed an individual who participated in the particular acts and practices challenged as well as dominating the corporation more generally. *Coran Bros. Corporation, et al.,* 72 F.T.C. 1 (1967).

else, usually at a higher price or on a basis more advantageous to the advertiser. The primary aim of a bait advertisement is to obtain leads as to persons interested in buying merchandise of the type so advertised.

No advertisement containing an offer to sell a product should be published when the offer is not a bona fide effort to sell the advertised product. 16 C.F.R. 238.0 - 238.1 (1976).

[44] Recent cases affirming the doctrine include *Tashof* v. *FTC*, 437 F.2d 707 (D.C. Cir., 1970); *Consumers Products of America, Inc.* v. *FTC*, 400 F.2d 930 (3 Cir., 1968), *cert. den.*, 393 U.S. 1088 (1969); and *Carpets "R" Us, Inc.*, D. 8947, Commission's Opinion of 2/26/76.

The only feature of respondent Kantor's "bait and switch" operation which might be considered novel is the fact that neither Kantor nor any of his henchmen actually made the representations contained in the Ideal Design TV commercial (CX 9b). It had, in fact, been running for some time before Kantor agreed to start buying the New Jersey leads. It seems plain, however, that this makes no significant difference in the equities of the situation.

Whether Kantor made his own representations or effectively adopted others' representations, the offense came to the same thing. In both cases he would know equally well consumers were being offered a very "alluring" bargain but an "insincere" one, since his own intentions (as possibly distinguished from those of Ideal) were to abandon and disparage the "bait," in order to "switch" the customer to vastly more profitable business as soon as the initial hurdle of getting a foot in the door could be accomplished.

It is the disparagement of one's own merchandise which largely distinguishes "bait and switch" from lawful "trading up".[15] From that viewpoint it makes no difference whether the pre-disparagement "bait" representations were made or adopted by Kantor. Either way it was the same unfiar business practice. We have no trouble finding that the evidence here amounted to a "bait and switch" operation and was, accordingly, an unfair trade practice.

[45] (b) In the course of the above "bait and switch" operation (but not necessarily part of it) he also managed by various devices to renege on the TV commercial's promise of a free vacuum cleaner or a 9' x 12' rug to buyers of the advertised carpeting.

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[15] Kintner, Earl W., *A Primer On The Law Of Deceptive Practices* (1971), p. 176.

Comment: Insofar as the TV commercial's offer of a gift to be included with purchase of carpeting was merely part of the bigger "bait and switch" operation found here, it's legality would seem to be governed by the same considerations just discussed. *Atlantic Sewing Stores, Inc.,* 54 F.T.C. 174, 179 (1957). Since, however, there was no switch of interest among the disappointed consumers as far as the gift was concerned, we are more inclined to view this as a simple matter of systematic failure to honor a promise broadcast to many small consumers and believed by them but probably not worth litigating in individual cases. It seems, in fact, one of those cases Mr. Justice Brandeis thought peculiarly suited to the mission of this Commission:

> To justify filing a complaint the public interest must be specific and substantial. . . . Sometimes (it is so) because, although the aggregate of the loss entailed may be so serious and widespread as to make the matter one of public consequence, no private suit would be brought to stop the unfair conduct, since the loss to each of the individuals affected is too small to warrant it.

(c) It has been his practice to write up carpeting sales contracts with a guarantee of so many years "wear" that is so vague as to be virtually worthless.

Comment: The deceptively vague guarantees of "6 years wear" or "8 years wear" or "10 years wear" etc. which respondent Kantor's salesmen were sometimes accustomed to write into their installment sales contracts [46] (apparently as the needs of the moment might dictate) fly so clearly in the face of this Commission's "Guides Against Deceptive Advertising of Guarantees" (adopted 4/26/60) that no further reference seems necessary. Those guides specify the standards by which guarantees are to be judged as follows:

> 239.1 *Guarantees in general.*
>
> In general, any guarantee in advertising shall clearly and conspicuously disclose -
>
> (a) The nature and extent of the guarantee. . . .
>
> (b) The manner in which the guarantor will perform. . . .
>
> (c) The identity of the guarantor. . . . 15 C.F.R. 239.1

[A subsequent policy statement by the Commission confirms that the Guides are applicable to both actual warranty documents and advertisements of warranties. 40 F.R. 60 168 (12/31/75)]

Respondents' guarantees clearly do not pass this test and,

accordingly, it is found that they constitute unfair acts and practices in commerce.

(d) His sale contracts have omitted terms important for the buyer to know, including credit price elements, disclosure of which is guaranteed by the Truth in Lending Act, and elementary quantity/unit cost data, knowledge of which might well have rendered Kantor's customers somewhat less susceptable to "bait and switch" and other predatory schemes.

Comment: The Truth in Lending Act and implementing Regulation Z of the Federal Reserve Board are very specific in their requirements regarding disclosure of the terms of consumer credit transactions and there is little if any room for a [47] plea of "substantial" compliance. One either is or is not. *Beauty-Style Modernizers, Inc.*, 83 F.T.C. 1761 (1974). Respondents' contracts are not. It is that simple.

The complaint also charges that respondents' carpeting form sales contracts long had no place for disclosing the quantity of carpeting or its unit (per yard) cost and that even later a new form anticipating a statement of quantity was never filled out in actual practice, while disclosure of unit cost is still not even within the contemplation of the form in use. We have been loathe to find this an unfair practice because it is certainly not the current understanding of the commercial community that disclosure of quantity sold and unit cost is mandatory or even usual in ordinary experience.

However, the mere fact that a trade practice may be lawful under ordinary circumstances, does not necessarily exempt it from proscription in special circumstances. Here we cannot escape the feeling that deliberately keeping consumers ignorant of the quantity and unit cost of the carpeting they were buying contributed something to Kantor's salesmen's striking ability to switch $77 buyers to $400, $500, $600 and even costlier carpeting. Accordingly, it is found that respondents' deliberate policy of keeping consumers as ignorant as possible of what they were really ordering, under the circumstances of this case, constituted an unfair trade practice.

(e) He has frequently sued New Jersey customers for alleged breach of contract or non-payment of the price of purchases in what is for them necessarily an inconvenient forum, the New York City Civil Court, thus denying these consumers a fair chance to litigate their rights under his sale contract or otherwise.

[48] *Comment:* A merchandiser-creditor's systematic abuse of its own state "long arm" venue statute to force its out-of-state consumer-debtors to pay without litigating their own claims or face the crushing burden of distant litigation has only recently been dealt with comprehensively and dispositively by this Commission in *Spiegel, Inc.*, 89 F.T.C. 425 (1975). We do not propose to plow the same ground again so soon. The present case is on all fours with *Spiegel,* except perhaps for the differing size of the merchandise-creditors in the two cases, and we hold that *Spiegel* controls this case.

(f) He has regularly obtained default judgments in disputes with his customers, not only by suing them in an inconvenient forum but by frequently seeing that such customers are not served with process or otherwise notified of his suits against them until it is too late and they have been defaulted.

Comment: This practice, commonly called "sewer service," is routinely condemned as depriving its victims of their fundamental rights to the due process ideal of the Constitution. *United States* v. *Wiseman,* 445 F.2d 792 (2d Cir. 1971), *cert. denied,* 404 U.S. 967; *United States* v. *Barr,* 295 F. Supp. 889 (S.D.N.Y. 1969). While we find no precedent for treating "sewer service" as an unfair trade practice, it would seem to fall well within the ambit and rationale of *Spiegel, Inc.*, 86 F.T.C. 425 (1975) in which, as we have just seen, this Commission assimilated the collection of commercial origin debts to the maintenance of a fair marketplace. We agree that "sewer service" is smelly business.

5. The aforesaid acts and practices of respondent Kanter and each of the corporate components of his integrated family enterprise have constituted deceptive acts and practices and unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act and in certain cases in violation of the [49] Truth in Lending Act and all have been to the prejudice and injury of the consuming public and to respondents' competitors. An order for relief from respondents' unfair practices is accordingly found to be in the public interest. [50]

RELIEF

Determination of the proper relief from continuation of the unfair acts and practices found starts with the notice order (hereafter sometimes "N.O.") attached to the complaint, which the Commission thought likely to be appropriate if the facts turned out to be as it had

reason to believe was the case when it issued the complaint. Conversely, divergences from the pleaded facts call for some divergences from the contemplated relief.

In this case, many key provisions of the notice order require little or no attention. N.O. I–2, I–3 and I–4 (now ALJ's I–2, I–3 and I–4) (cease and desist from "bait and switch" sales tactics) are plainly appropriate, with one minor addition. (I–2 has been revised to reach more clearly representations "adopted", as in this case, as well as those expressly "made" by respondent. N.O. I–13 and I–14 (now ALJ's I–6 and I–7) seem appropriate to prevent misrepresentation and/or non-delivery of gifts offered, specifically when employed to sweeten a carpeting or other deal. Similarly, N.O. I–24 (now ALJ's I–17) hopefully solve the problem of deceptively vague guarantees.

The various provisions of Part II lay down quite detailed rules for respondent's use of legal process in suits against customers for alleged non-payment of debts or other deficiencies. We would be loathe to tinker with such a (necessarily) elaborate scheme, even if it seemed less adapted than appears to ending such manifestly unfair practices as respondent's abuse of New York's "long arm" venue statute and "sewer service," both well calculated to deprive consumer-debtors of the most elementary due process of law.

The provisions of Part III of the order are very specific, as befits the very specific requirements of the Truth in Lending Act, as to which the Commission has said there is no such thing as "substantial" performance. A creditor either is or is not in violation of that act and there is accordingly little room for argument about a cease and desist order in case of a violation. There are, of course, various other less important provisions of the order than those we have just singled out which seem entirely proper. We turn now to a number of provisions of the complaint order which we find less satisfactory.

[51] In their proposed order, complaint counsel have already recognized that five sections of the notice order should be dropped in whole or in part because the evidence developed during the trial of the violation issues would not support such relief. We concur in all instances and have deleted the following provisions.

N.O. I-1 (now ALJ's I-1[b]): portion requiring respondent to maintain an adequate supply of advertised product deleted.

N.O. I-5 (now deleted entirely): prohibition against representing carpet is cut to fit area covered when pre-cut before installation.

N.O. I-6 (now deleted entirely): portion prohibiting misrepresentation of respondent's method of measuring-up for carpeting or of determining selling prices on the basis of such measurements.

N.O. I-25 (now deleted entirely): prohibited unilateral substitution of different merchandise for that ordered by purchaser.

N.O. I-26 (now deleted entirely): prohibited unilateral cancellation of purchase orders respondent found he could not or would not supply and ordered refunds of all payments already made.

To these five instances where the complaint counsel have themselves suggested deletion for insufficient proof of violation, the Administrative Law Judge has added eight more, where he is convinced that a provision requires deletion or modification due to failure of proof.

[52] N.O. I-1 (portion now designated I-1[b]): re-written to reflect the proof that the sales leads involved here were actually obtained from an ad agency, not from the advertiser; revised also to give respondent an alternative to meeting the original advertiser's price willy nilly (as complaint counsel would have it) if respondent will immediately disclose his differing identity and differing prices (or other conditions of sale) to all purchaser leads actually approached by him.

N.O. I-6 (now deleted entirely): portion which was not deleted at complaint counsel's suggestion, *i.e.*, prohibition against representing that respondent's carpeting is sold by the unit rather than by the square yard. [Query relevancy even if proved].

N.O. I-7 (now ALJ's 5): originally ordered disclosure that respondent's carpeting is sold by the square yard and reference to price per square yard; revised by Administrative Law Judge to require disclosure in sales contracts of quantity purchased and unit price, in accordance with violation found.

N.O. I-8 (now deleted entirely): ordered disclosure during any sales presentation that selling firm was not the advertiser (if such was the case); proof revealed

almost no confusion of identity to support such finding.

N.O. I-9 (now deleted entirely): these three paragraphs
N.O. I-10 (now deleted entirely): prohibited in various
N.O. I-11 (now deleted entirely): ways advertising "special" prices that were not really "special;" proof showed they were "special."

[53] N.O. I-12 (now deleted entirely): ordered disclosure, where word "free" is used re bonus for purchase of other merchandise, that all conditions of "free" gift must be met; advertisement in question (CX 9b) never used word "free" and issue was respondent's good faith in promising "free" gift in connection with "bait and switch" tactics.

Complaint Counsel have proposed two *additions* to the relief referred to in the notice order, both of which have been adopted by the Administrative Law Judge. The first is the minor addition of a caveat in N.O. I-24 (now ALJ's I-17) that the terms of this order are not intended to relieve respondent of any duties under other laws (having in mind particularly the relatively new Magnuson-Moss Act concerning warranties). Secondly, they have sought a prohibition against Kantor's continued use of the word "Inc." as part of the tradename "New Rapids Furniture Warehouses, Inc." ever since the corporation was dissolved, a fact clearly established by the evidence here. It has been held that such a practice is unfair because it tends to deceive customers who prefer to deal with corporations as being more responsible than individuals, etc., *In the Matter of Kodize Process Corporation, et al.*, 40 F.T.C. 441, 1945 and accordingly, we have added such a provision in N.O. I-1 (now ALJ's I-1(a)).

Finally, complaint counsel have also proposed certain changes in wording throughout the order to conform the relief to the fact that emerged from the trial that all of the respondent corporations (New Rapids Carpet Center, Inc., Charge Account Factors, Inc., Charge Account Credit Corp.) and another affiliate (New Rapids Furniture Warehouses, Inc.) have been dissolved for varying lengths of time, as a result of which complaint counsel now desire that the cease and desist order run only against Lee Kantor, a/k/a Lee Woods, individually and as an officer of each of the constituent corporations of his integrated family enterprise, and as doing business individually under the name "New Rapids Furniture Warehouses, Inc." since dissolution of that corporation. The Administrative Law Judge doubts necessity for the order (as distinguished from the complaint)

to refer to Kantor's former positions in dissolved corporations, particularly since the order expressly binds him, his agents, representatives and employees "directly or through any corporation, subsidiary or other device" (see prefaces to Parts I, II and III). In view, however, of the [54] Commission staff's apparent view that the proposed language will have some practical enforcement value and since retaining complaint counsel's language can hardly have any ill effects, the Administrative Law Judge has retained the proposed language in the several sectional prefaces and has adopted other related minor changes such as substituting "respondent" for "respondents" throughout the order and deleting an unnumbered paragraph in N.O. V (now ALJ's IV) requiring the respondent corporations to notify the Commission of significant changes in their status.

[55] The following order will be issued.

ORDER

I

It is ordered, That respondent Lee Kantor, a/k/a Lee Woods, individually, and as a former General Manager of New Rapids Carpet Center, Inc., and as an individual doing business, as New Rapids Furniture Warehouses, Inc. and respondent's agents, representatives and employees directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of carpets, furniture, appliances and other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1.(a) Using "Inc." in the trade name used to designate the business operated by him individually, or otherwise representing in any manner that said business is incorporated or operated by a corporation.

(b) Obtaining sales leads or prospects arising out of any advertising other than respondent's own for the purpose of selling or offering to sell the advertised product without selling or offering to sell such product pursuant to all the advertised terms, unless fair notice is given at the time of the first sales approach of (1) the separate identities of the advertiser to seller and (2) any difference in their prices or other conditions of sale of the advertised product.

2. Using, in any manner, a sales plan, scheme, or device wherein false, misleading or deceptive statements or representations are made or adopted in order to obtain leads or prospects for the sale of carpeting or other merchandise or services.

3. Making representations, orally or in writing, directly or by

implication, purporting to offer merchandise for sale when the purpose of the representation is not to sell the offered merchandise but to obtain leads or prospects for the sale of other merchandise at higher prices.

4. Disparaging, in any manner, or discouraging the purchase of any merchandise or services which are advertised or offered for sale.

[56] 5. Failing to disclose clearly and conspicuously in all carpeting sales contracts the quantity sold and the price per square yard for such carpeting.

6. Misrepresenting, orally, visually, in writing or in any other manner, directly or by implication, the nature of any gift and the conditions under which it is given.

7. Failing to make delivery to respondent's customers of any gift or bonus product advertised or offered in connection with the purchase of carpeting or any other merchandise.

8. Contracting for any sale whether in the form of trade acceptance, conditional sales contract, promisory note, or otherwise which shall become binding on the buyer prior to midnight of the third day, excluding Sundays and legal holidays, after the date of execution.

9. Failing to furnish the buyer with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution, which is in the same language as that principally used in the oral sales presentation and which shows the date of the transaction and contains the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used and in boldface type of a minimum size of 10 points, a statement in substantially the following form:

> YOU, THE BUYER, MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT.

10. Failing to furnish each buyer, at the time he signs the sales contract or otherwise agrees to buy consumer goods or services from the seller, a completed form in duplicate, captioned "NOTICE OF CANCELLATION," which shall be attached to the contract or receipt and easily detachable, [57] and which shall contain in 10 point boldface type the following information and statements in the same language as that used in the contract:

NOTICE OF CANCELLATION

[*enter date of transaction*]

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN THREE BUSINESS DAYS FROM THE ABOVE DATE.

IF YOU CANCEL, ANY PROPERTY TRADED IN, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT OR SALE, AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN 10 BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF YOUR CANCELLATION NOTICE, AND ANY SECURITY INTEREST ARISING OUT OF THE TRANSACTION WILL BE CANCELLED.

IF YOU CANCEL, YOU MUST MAKE AVAILABLE TO THE SELLER AT YOUR RESIDENCE, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED, ANY GOODS DELIVERED TO YOU UNDER THIS CONTRACT OR SALE; OR YOU MAY IF YOU WISH, COMPLY WITH THE INSTRUCTIONS OF THE SELLER REGARDING THE RETURN SHIPMENT OF THE GOODS AT THE SELLER'S EXPENSE AND RISK.

[58] IF YOU DO MAKE THE GOODS AVAILABLE TO THE SELLER AND THE SELLER DOES NOT PICK THEM UP WITHIN 20 DAYS OF THE DATE OF YOUR NOTICE OF CANCELLATION, YOU MAY RETAIN OR DISPOSE OF THE GOODS WITHOUT ANY FURTHER OBLIGATION. IF YOU FAIL TO MAKE THE GOODS AVAILABLE TO THE SELLER, OR IF YOU AGREE TO RETURN THE GOODS TO THE SELLER AND FAIL TO DO SO, THEN YOU REMAIN LIABLE FOR PERFORMANCE OF ALL OBLIGATIONS UNDER THE CONTRACT.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM, TO [*name of seller*], AT [*address of seller's place of business*], NOT LATER THAN MIDNIGHT OF _____.

I HEREBY CANCEL THIS TRANSACTION.

_____
(Date)

_____
(Buyer's signature)

11. Failing, before furnishing copies of the "Notice of Cancellation" to the buyer, to complete both copies by entering the name of the seller, the address of the seller's place of business, the date of the transaction, and the date, not earlier than the third business day following the date of the transaction, by which the buyer may give notice of cancellation.

12. Failing to inform each buyer orally, at the time he signs the contract or purchases the goods or services, of his right to cancel.

13. Misrepresenting, directly or indirectly, orally or in writing, the buyer's right to cancel.

[59] 14. Failing or refusing to honor any valid notice of cancellation by a buyer and within 10 business days after the receipt of such notice, to (i) refund all payments made under the contract or sale; (ii) return any goods or property traded in, in substantially as good condition as when received by the seller; (iii) cancel and return any negotiable instrument executed by the buyer in connection with the contract or sale and take any action necessary or appropriate to terminate promptly any security interest created in the transaction.

15. Negotiating, transferring, selling or assigning any note or other evidence of indebtedness to a finance company or other third party prior to midnight of the fifth business day following the day the contract was signed or the goods or services were purchased.

16. Failing, within 10 business days of receipt of the buyer's notice of cancellation, to notify him whether the seller intends to repossess or to abandon any shipped or delivered goods.

Provided, however, that nothing contained in this order shall relieve respondents of any additional obligations respecting contracts required by federal law or the law of the state in which the contract is made. When such obligations are inconsistent, respondents can apply to the Commission for relief from this provision with respect to contracts executed in the state in which such different obligations are required. The Commission, upon a showing of inconsistency shall make such modifications as may be warranted in the premises.

17. Representing, orally or in writing, directly or by implication, that any product or service is guaranteed unless the nature and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed; and respondents deliver to each purchaser, prior to the signing of the sales contract, a written guarantee clearly setting forth all of the terms, conditions and limitations of the guarantee equal to the representations, orally or in writing, directly or by implication, made to each such purchaser, and unless respondents promptly and fully perform all of their obligations and requirements under the terms of each such guarantee.

[60] Nothing in this order shall be construed to relieve respondent of his duty to comply with present and future laws, regulations and rules dealing with warranties or guarantees.

II

It is ordered, That respondent Lee Kantor, a/k/a Lee Woods, individually, and as former General Manager of New Rapids Carpet Center, Inc. and as a former officer of Charge Account Factors, Inc. and as a former officer of Charge Account Credit Corp., all of which corporations are now defunct, and as an individual doing business as New Rapids Furniture Warehouses, Inc., and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device in connection with the collection of consumer debts, shall forthwith cease and desist from:

Failing to give customer-debtors the opportunity to provide respondents with an affirmative statement as to the reason for any alleged default in payment and to furnish the alleged debtor along with the first notice of an alleged default, a self-addressed stamped postcard allowing customer-debtors to either deny liability completely, or to dispute the amount of the debt, or to indicate any other reason for non-payment of the debt. The form of the postcard shall be as follows:

I have not paid this bill for the following reason:

1- ( ) It's a mistake. I don't owe anything because _____

2- ( ) It's a mistake. The balance should only be $ _____

3- ( ) State any other reason for non-payments:

It is further ordered, That upon receipt of said card indicating the reason for non-payment, all further collection attempts shall be temporarily discontinued and respondent shall designate a responsible individual with respondent's organization who shall make an effort to arrive at a fair and equitable adjustment.

[61] *It is further ordered,* That respondent shall commence legal action against his customers only:

1. Where the debtor does not return the postcard within thirty days after the date of mailing, or

2. Where in the reply the debtor has indicated a dispute over the debt and respondent's representative has made a good faith effort to arrive at a mutually satisfactory resolution of the dispute and such efforts have been unsuccessful.

It is further ordered, That:

1. Where respondent brings suit against a consumer for non-payment of any amount claimed to be due on account of a retail purchase or extension of credit in connection with such purchase or

on account of any contract or security instrument in connection with such purchase, respondents shall notify such consumer of such suit by sending a copy of the summons or other document initiating the action by first class mail with certificate of mailing and "do not forward" and "address correction requested" noted thereupon, to the last known address of such consumer, in addition to any other notification or service required by any other applicable federal, state or local law, rule, practice or custom.

2. Respondent shall send a second notice of suit, in the form and manner described in subparagraph 1 above:

a. To the consumer at a new address when a new address is secured as a result of the first mailing, or

b. To the consumer in care of his place of employment, if known, when the U.S. Postal Service returns the original notice, indicating inability to make delivery and without an address correction noted thereon. Nothing on the outside of any envelope sent care of such place of employment shall indicate the nature of the contents thereof or that it involves a claimed debt; and the envelope shall have as the return address thereon only a post office box address or a vendor's name.

[62] *Provided, however,* that respondents shall not send any notice of suit to a consumer in care of his place of employment unless notice has been attempted under 1 and 2(a) above.

It is further ordered, That where respondents bring suit against any consumer for non-payment of any amount claimed to be due on account of a retail purchase by such consumer or extension of credit in connection with such purchase or on account of any contract or security instrument in connection with such purchase, respondent shall not bring suit except in the county where the defendant:

1. Resides at the commencement of the action, or
2. signed the contract.

This provision shall not preempt any rule of law further limiting choice of forum.

It is further ordered, That when respondents have received satisfaction or partial satisfaction of a judgment, respondents shall within 10 days of the receipt, execute and file a satisfaction piece or partial satisfaction piece with the Clerk of the Court in which the judgment has been obtained.

It is further ordered, That respondents prepare and mail to all customers who have signed retail installment contracts which are not completely paid up, quarterly statements which shall include the previous balance at the beginning of the quarter, the payments made

during the quarter, interest and late charges, if any, and the balance due as the date of mailing.

III

It is ordered, That respondent Lee Kantor, a/k/a Lee Woods, individually and as a former General Manager of New Rapids Carpet Center, Inc., and as an individual doing business as New Rapids Furniture Warehouses, Inc., as a former officer of Charge Account Factors, Inc. and a former officer of Charge Account Credit Corp. and respondent's agents, representatives, and employees, [63] directly or through any corporation, subsidiary, division or other device, in connection with any extension of consumer credit or any advertisement to aid, promote or assist directly or indirectly any extension of consumer credit as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. 226) of the Truth in Lending Act (Pub. Law 90–321, 15 U.S.C. 1601; *et seq.*), do forthwith cease and desist from:

1. Failing to disclose, before the transaction is consummated, as required by Section 226.8(a), the following:

(a) The amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments as required by Section 226.8(b)(4) of Regulation Z.

(b) Identification of the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation, and a statement of the amount or method of computation of any charge that may be deducted from the amount of any rebate of such unearned finance charge that will be credited to the obligation or refunded to the customer as required by Section 226.8(b)(7) of Regulation Z.

(c) The amount of the finance charge, as required by Section 226.8(c)(8)(i) of Regulation Z.

(d) The annual percentage rate, computed in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

2. Failing to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment, as required by Section 226.8(c)(3) of Regulation Z.

[64] 3. Failing to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price," as prescribed by Section 226.8(c)(8)(ii) of Regulation Z.

4. Failing, in any consumer credit transaction or advertisement,

to make all disclosures determined in accordance with Sections 226.4 and 226.5 of Regulation Z, at the time and in the manner, form and amount required by Sections 226.6, 226.7, 226.8, 226.9 and 226.10 of Regulation Z.

IV

It is further understood that nothing contained in this order shall be construed in any way to annul, invalidate, repeal, terminate modify or exempt respondent from complying with agreements, orders or directives of any kind obtained by any other agency or act as a defense to action instituted by municipal or state regulatory agencies.

Nothing in this order shall be construed to imply that any past or future conduct of respondent is subject to and complies with the Rules and regulations of, or the statutes administered by the Federal Trade Commission.

It is further ordered, That respondent deliver a copy of this order to cease and desist to all present and future personnel of respondent engaged in the consummation of any extension of consumer credit and in the collection of debts, or in any aspect of preparation, creation, or placement of advertising, and that respondent secure a signed statement acknowledging receipt of said order from each such person.

[65] *It is further ordered,* That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged, as well as a description of the duties and responsibilities.

Final Order

[1] The administrative law judge filed his initial decision in this matter on January 19, 1977, and service was completed on February 14, 1977. Neither party filed an appeal from the initial decision. However, by letter of February 19, 1977, counsel for respondents requested that the Commission issue an order placing this matter on its own docket for review, pursuant to Section 3.53 of the Commission's Rules of Practice. On February 22, 1977, complaint counsel filed its opposition to respondents' request. By order of March 14, 1977, the Commission stayed the effective date of the initial decision until further order of the Commission.

[2] The ground upon which respondents' counsel bases his request is the assertion that "the Findings of Fact set forth by the Administrative Law Judge do not support the order. . . ." No reasons are provided for this assertion.

The Commission has determined to deny respondents' request that this matter be placed on the Commission's own docket for review. The appropriate method by which respondents should have sought Commission review of the initial decision was by filing an appeal under Section 3.52 of the Commission's Rules. In any event, respondents have furnished no reasons, and the Commission can discern none, why the findings of fact do not support the order. However, the Commission has determined to place this matter on its own docket for review for the limited purposes of correcting technical errors in the initial decision and determining the appropriateness of the order recommended by the administrative law judge, in accordance with Sections 3.51(a) and 3.54 of the Commission's Rules. The Commission has determined that the initial decision should become effective as provided in Section 3.51 of the Commission's Rules, with the following modifications:

(1) In Finding 22, line 5, insert "in" between "only" and "New."

(2) Add Table II, which had been inadvertently omitted from Finding 71 in the printed edition of the initial decision, to that Finding.

[3] (3) In the first paragraph of Part IV of the order, line 6, substitute "municipal" for "minicipal."

(4) In lieu of the last order provision in Part IV pertaining to notification by the individual respondent of changes in his business or employment, substitute:

> *It is further ordered,* That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. In addition, for a period of ten years from the effective date of this order, the respondent shall promptly notify the Commission of each affiliation with a new business or employment. Each such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

Therefore, it is ordered, That the initial decision and order

contained therein, as modified above, shall become effective on the date of issuance of this order.

IN THE MATTER OF

CAVANAGH COMMUNITIES CORPORATION, ET AL.

Docket 9055. Interlocutory Order, July 26, 1977

Denial of respondents' motion to withdraw matter from adjudication.

ORDER DENYING RESPONDENTS' MOTION TO WITHDRAW MATTER FROM ADJUDICATION

The administrative law judge has certified to the Commission respondents' motion to withdraw this matter from adjudication for settlement purposes, together with his recommendation that the motion be granted. The motion is opposed by complaint counsel.

Although we agree with the ALJ that progress has been made in drafting an order that would obviate the need for litigation, we cannot now find that there is a sufficient "likelihood of settlement," Rules of Practice, Section 3.25(c), to warrant a further delay of the trial. Instead, we urge the parties to continue their negotiations. In the event negotiations are unsuccessful and respondents choose to renew their motion to withdraw, respondents should include in their submission a revised consent agreement that reflects any changes in their position since the original proffered consent was filed. If the ALJ certifies the motion, we would expect to receive more substantial justification in support of the proffered order. In assessing the adequacy of remedial provisions, for example, it would be helpful if any future submission included the appraisal and absorption study now being conducted and respondents' substantiation of the reasonableness of their proposed default limitation.[1]

Respondents' motion is accordingly denied.

It is so ordered.

[1] We do not mean to suggest that there would be a "likelihood of settlement" if the two issues to which these materials relate were satisfactorily resolved.

IN THE MATTER OF

LINDAL CEDAR HOMES, INC., ET AL.

Docket C-2774. Interlocutory Order, July 26, 1977

Denial of corporate respondent's petition for modification of order to cease and desist to provide a waiver of the requirement of furnishing prospective franchisees with extensive, specified information and a copy of the franchise agreement prior to the running of fifteen business days.

ORDER DENYING PETITION FOR MODIFICATION OF ORDER

Respondent, Lindal Cedar Homes, Inc., a firm engaged in the sale of franchises, has filed a petition to modify those portions of an order to cease and desist, issued on January 5, 1976, which requires it to furnish prospective franchisees extensive, specified information concerning its franchises and a copy of the franchise agreement "at least fifteen days prior to the execution by the prospective franchisee of any franchise agreement or any other binding obligation or the payment by the prospective franchisee of any consideration in connection with the sale or proposed sale of a franchise." Respondent requests that the order provisions imposing these requirements be modified by adding thereto the words "unless, however, the prospective franchisee and its attorney execute a written waiver of the fifteen business days requirement." The Bureau of Consumer Protection has filed an answer opposing the requested modification.

As grounds for its petition, respondent contends that there have been "a number of occasions when a prospective franchisee, represented by counsel, has requested a formal franchise agreement be executed prior to the running of fifteen business days" and that it believes that the prospective franchisee's rights will be fully protected since the prospective franchisee will be represented by an attorney who must sign the waiver.

We agree with the Bureau of Consumer Protection that the petition should be denied. Respondent does not allege that changed conditions of fact or law require the proposed modification nor has it made a showing that public interest considerations require such a modification. There is no indication that the order has or will cause undue hardship on respondent or prospective franchisees, and the Commission is not persuaded that legal representation is in all respects an adequate substitute for the required fifteen day waiting period.

Accordingly, *It is ordered,* That respondent's petition for modification of the order to cease and desist be, and it hereby is, denied.

IN THE MATTER OF

PORTER & DIETSCH, INC., ET AL.

Docket 9047. Interlocutory Order, July 28, 1977

Denial of respondent's objection to participation of Chairman Pertschuk and Commissioner Dole, and consolidated motion for expedited decision and hearing.

ORDER DENYING "RESPONDENT'S OBJECTION TO PARTICIPATION OF CHAIRMAN PERTSCHUK AND COMMISSIONER DOLE, AND CONSOLIDATED MOTION FOR EXPEDITED DECISION AND HEARING"

On July 22, 1977, respondents filed a motion for dismissal or, in the alternative, a hearing "in order to demonstrate to the Commission prejudicial delay in rendering a decision in this case sufficient to warrant dismissal . . ." The stated grounds are that: (1) Chairman Pertschuk's participation is unauthorized by Section 3.52(f) of the Commission's Rules, 16 C.F.R. 3.52(f), because he was not a member of the Commission at the time of the oral argument on appeal from the initial decision; (2) Commissioner Dole took a brief leave of absence of eight weeks during which she, also, was absent from the same oral argument; (3) apart from the "impropriety" of Chairman Pertschuk or Commissioner Dole participating, both would have to review and consider the record in this matter, causing the respondents prejudicial delay; and (4) the ten-month delay to date in deciding this matter has forced Kelly Ketting Furth to discontinue its business and has cost Porter & Dietsch lost sales.

As we said in *Retail Credit Co.*, Dkt. 8920, "Order Denying Motion for Reargument," October 26, 1976, a Commissioner who has not heard oral argument can participate in the decision of a case.

> The decision of numerous courts and administrative agencies establish that, even without agreement of the parties, a member of an administrative agency who did not hear oral argument may nevertheless participate in the decision where he has the benefit of the record before him. *Gearhart & Otis, Inc.* v. *SEC*, 348 F.2d 798, 802 (D.C. Cir. 1965) (footnotes omitted).

Respondents' only authority for the contrary proposition is, in the words of the *Gearhart* opinion, the "only case which looks in the opposite direction," *WIBC, Inc.* v. *FCC*, 259 F.2d 941 (D.C. Cir.), *cert. denied, sub nom. Crosley Broadcasting Corp.* v. *FCC*, 358 U.S. 920 (1958), which is "easily distinguishable," in part because oral argument was required by then-existing provisions of the Communications Act, 47 U.S.C. 409(b) (1952). 348 F.2d at 802.

Contrary to respondents' impression, Section 3.52(f) of the Commission's Rules does not apply solely to Commissioners who were members of the Commission at the time oral argument was heard on an appeal from an initial decision. Indeed, Section 3.52(f) contemplates that Commissioners not present at oral argument will participate in the consideration and disposition of an appeal in which oral argument has been stenographically recorded. Oral argument is not required by the Federal Trade Commission Act and the Commission possesses the authority, under Section 3.52(f), to dispense with oral argument on its own motion. Since respondents are "not entitled to present oral argument as a matter of right," neither are they prejudiced by the participation of Commissioners who have not heard oral argument. *Retail Credit, id.*

As for the delay of ten months in deciding this appeal, respondents themselves contend, in objecting to the participation of Chairman Pertschuk and Commissioner Dole, that this matter involves a "voluminous record" which would take an unreasonable amount of time for those ostensibly unacquainted with it to master. Respondents do not contend that this matter has taken longer than usual to dispose of similar proceedings or that the Commission has a "dilatory attitude" in regard to this matter. *FTC* v. *J. Weingarten, Inc.*, 336 F.2d 687 (5th Cir. 1964). Respondents themselves requested a four-month delay in this matter in which to prepare an appeal brief in a motion which was denied on July 22, 1976.

Respondents also renew their objection to the press release announcing issuance of the administrative complaint. That objection has been disposed of and we see no need to disturb our prior orders concerning that issue, 86 F.T.C. 896, 1570 (1975). Accordingly,

It is ordered, That respondents' "Objection to Participation of Chairman Pertschuk and Commissioner Dole, and Consolidated Motion for Expedited Decision and Hearing" be, and it hereby is, denied.

IN THE MATTER OF

WALGREEN CO.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2897. Complaint, Aug. 3, 1977—Decision, Aug. 3, 1977

This consent order, among other things, requires a Deerfield, Ill. retail drug store chain, to cease disseminating advertisements that offer any item for sale, unless such item is available for sale at or below advertised price, in reasonably sufficient quantities to meet anticipated demands. Further, respondent is required to conspicuously post advertisements and disclosure statements at designated locations; maintain specified business records; and institute a surveillance program designed to ensure that its stores comply with the terms of the order.

Appearances

For the Commission: *Richard A. Palewicz.*

For the respondent: *Pasquale A. Zambrino* and *John O'Connell,* Deerfield, Ill.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Walgreen Co., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Walgreen Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 200 Wilmot Road, Deerfield, Illinois.

PAR. 2. Respondent is now, and for some time last past, has been engaged in the operation of a large chain of retail drug stores throughout the United States. Its national distribution of products is broadened by the franchising of over 1800 independently owned "Walgreen Agency Stores." Respondent's volume of business has been and is substantial. In the operation of its retail drug stores, respondent offers to its customers an extensive line of general merchandise, drug and cosmetic products. Many of the said products offered for sale and sold are manufactured or processed by respon-

dent through its various divisions, subsidiaries and affiliates at manufacturing and processing plants located in various states. Many of the said products, however, are purchased from numerous independent suppliers located throughout the United States.

PAR. 3. In the course and conduct of its business, as aforesaid, respondent now causes, and for some time last past has caused, directly or indirectly, the aforesaid general merchandise, drug and cosmetic products to be shipped and distributed from the aforesaid manufacturing and processing plants or from its other sources of supply to warehouses and distribution centers and thereafter to its retail drug stores located in various states other than the state of origination, distribution or storage of said products. Respondent maintains, and at all times mentioned herein has maintained a substantial course of trade in the production, processing, distribution, advertising, offering for sale and sale of the general merchandise, drug and cosmetic products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business, as aforesaid, and for some time last past respondent has been and is now disseminating, and causing the dissemination of, certain advertisements concerning the aforesaid general merchandise, drug and cosmetic products by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to, advertisements in newspapers of general and interstate circulation and other advertising media, for the purpose of inducing and which were and are likely to induce, directly or indirectly, the purchase of said products from respondent; and respondent has been and is now disseminating, and causing the dissemination of, advertisements concerning said products by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were and are likely to induce, directly or indirectly, the purchase from respondent of the said products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act. Many of the said advertisements list or depict the aforesaid general merchandise, drug and cosmetic products and also contain statements and representations concerning the price or terms at which said products would be offered for sale. Many of the aforesaid advertisements contain further direct and express statements and representations concerning the time periods during which the offers would be in effect and geographical areas in which the offers would be made.

PAR. 5. Through the use of such advertisements disseminated and now being disseminated in various areas of the United States served

by respondent's retail drug stores, respondent has represented and is now representing directly or by implication that in those stores covered by such advertisements, during the effective periods of the advertised offers, the items listed or depicted in such advertisements would be or are:

A. Readily available for sale to customers;

B. Conspicuously available for sale at or below the advertised prices; and

C. Sold to consumers at or below the advertised price.

PAR. 6. In truth and in fact, in a number of respondent's retail drug stores located in metropolitan areas in which the aforesaid advertisements were disseminated, and covered by such advertisements during the effective periods of the advertised offers, a substantial number of items listed or depicted in the said advertisement were or are:

A. Not readily available for sale;

B. Not conspicuously available for sale at or below the advertised prices; or

C. Sold to customers at a price higher than the advertised price.

Therefore, the statements and representations as referred to herein, were and are false, misleading and deceptive.

PAR. 7. By disseminating or causing the dissemination of advertisements which offer or present for sale items as aforesaid, and by failing to have in each of its stores covered by such advertisements, during the effective periods of the advertised offers, in quantities sufficient to meet reasonably anticipated demands, the advertised items:

A. Readily available for sale to customers; or

B. Conspicuously available for sale at or below the advertised prices;

respondent has been and now is engaged in unfair acts and practices.

PAR. 8. By disseminating or causing the dissemination of advertisements which offer or present for sale items at specific prices, as aforesaid, and during the effective periods of such advertised offers at certain stores covered by said advertisements, by selling said items or other merchandise to customers at prices higher than the advertised prices, respondent has been and now is engaged in unfair acts and practices.

PAR. 9. In the course and conduct of its business, and at all times

referred to herein, respondent has been and now is in substantial competition in commerce, with corporations, partnerships, firms and individuals in the retail general merchandise, drug and cosmetic business.

PAR. 10. The use by respondent of the aforesaid unfair and false, misleading and deceptive statements, representations, acts and practices, has had and now has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the said statement and representations were and are true, and to induce such persons to go to respondent's stores and to purchase from respondent substantial quantities of the advertised items at prices in excess of the advertised prices and substantial quantities of items other than the advertised items.

PAR. 11. The acts and practices as aforesaid, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted and now constitute unfair methods of competition in commerce and unfair or deceptive acts or practice in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Chicago Regional Office proposed to present to the Commission for its consideration, and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Sec. 2.34 of its Rules, the Commission hereby

issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Walgreen Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 200 Wilmot Road, Deerfield, Illinois.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That respondent Walgreen Co., a corporation, its successors or assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of general merchandise, drug or cosmetic products, hereafter sometimes referred to as items, offered or sold in its retail drug stores, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from, directly or indirectly:

A. Disseminating, or causing the dissemination of any advertisement by any means which offers any items for sale at a stated price, unless during the effective period of the advertised offer at each retail store covered by the advertisement:

1. Each advertised item is readily available for sale to customers in the public area of the store, or if not readily available there, a clear and conspicuous notice is posted where the item is regularly displayed which states that the item is in stock and may be obtained upon request, and said item is furnished on request;

2. There is a sign or other conspicuous marking at the place where an item advertised below regular shelf price is displayed for sale, clearly disclosing that the item is "as advertised" or "on sale" or words of similar import as appropriate, and disclosing on such sign or marking, the advertised price;

3. Each advertised item which is usually and customarily individually marked with a price, is individually, clearly, and conspicuously marked with the advertised price;

4. Each advertised item is sold to customers at or below the advertised price.

The Commission recognizes that technical per se violations of Section I of this order are inevitable despite the honest best efforts of

respondent to ensure availability and proper pricing of advertised items. Therefore, in determining compliance with Section I of this order, the Commission will consider (a) all circumstances surrounding nondelivery of advertised products which were actually ordered in quantities sufficient to meet reasonably anticipated demands but were not delivered due to circumstances beyond respondent's control, and (b) all circumstances surrounding failure to make advertised items conspicuous and readily available for sale at or below the advertised prices due to circumstances beyond respondent's control.

Provided, it shall constitute a defense to a charge of unavailability under subparagraph I.A.1. if respondent maintains and furnishes or makes available for inspection and copying upon the request of the Federal Trade Commission, such records and affidavits as will show that (a) the advertised items were delivered to its stores in quantities sufficient to meet reasonably anticipated demand, or (b) the advertised items were ordered but not delivered due to circumstances beyond respondent's control, and that respondent, upon notice or knowledge of such nondelivery acted immediately to contact the media to correct the advertisement or proposed advertisement to reflect the limited availability or unavailability of each advertised item, and (c) respondent immediately offered to customers on inquiry a "rain check" for each unavailable item which entitled the holder to purchase the item in the near future at or below the advertised price, or a similar product of equal or better quality at or below the advertised price of the unavailable product.

Provided, further, that it shall not be deemed a violation of subparagraphs I.A.1., I.A.2., I.A.3., or I.A.4., if respondent is complying with a specific exemption, limitation or restriction with respect to store, item or price which is clearly and conspicuously disclosed in all advertisements for the product in question.

Provided, further, that an advertised item which is usually and customarily individually marked with a price, need not be marked with the advertised price but may remain marked at its regular price if both (i) a conspicuous sign at the site of the display of such item clearly states that the cashiers know the sale price; and (ii) the cashiers do in fact have a written list containing such sale price, have been instructed to charge the sale price for said item, and do in fact charge the customer the sale price.

II.

It is further ordered, That throughout each advertised sale period in each of its retail stores covered by an advertisement, respondent shall post conspicuously (1) at or near each doorway affording

entrance to the public, and (2) at or near the place where customers pay for merchandise, notices which contain the following information:

A. A copy of the advertisement.

B. A statement that: "All items listed in the advertisement are required to be available for sale at or below the advertised price."

C. A clear and conspicuous statement of respondent's rain check program which will inform customers that:

1. A rain check will be promptly issued by any store employee when an advertised item is unavailable.

2. A rain check will enable customers to purchase an unavailable item at the advertised price when stocks are replenished or, if such replenishment is impossible, a similar item of equal or better quality will be substituted.

3. A rain check will be valid for a period of thirty (30) days.

III.

It is further ordered, That respondent shall cause the following statement to be clearly and conspicuously set forth in each advertisement which represents that items are available for sale at a stated price at any of its stores: "Each of these advertised items is required to be readily available for sale at or below the advertised price in each Walgreen store, except as specifically noted in this ad."

IV.

It is further ordered, That:

A. Respondent shall forthwith deliver a copy of this order to each of its operating divisions and to each of its present and future officers and other personnel in its organization down to the level of and including assistant store directors who, directly or indirectly, have any supervisory responsibilities as to individual retail stores of respondent, or who are engaged in any aspect of preparation, creation, or placing of advertising, and that respondent shall secure a signed statement acknowledging receipt of said order from each such person;

B. Respondent shall institute and maintain a program of continuing surveillance adequate to reveal whether the business practices of each of its retail stores conform to this order, and shall confer with any duly authorized representative of the Commission;

C. Respondent shall, for a period of three (3) years subsequent to the date of this order:

1. Maintain business records which show the efforts taken to

insure continuing compliance with the terms and provisions of this order;

2. Grant any duly authorized representative of the Federal Trade Commission access to all such business records;

3. Furnish to the Federal Trade Commission copies of such records which are requested by any of its duly authorized representatives.

D. Respondent shall, all other provisions of this order notwithstanding, on or before each of the first three (3) anniversary dates of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order in the preceding year.

It is further ordered, That no provision of this order shall be construed in any way to annul, invalidate, repeal, terminate, modify or exempt respondent from complying with agreements, orders or directives of any kind obtained by any other agency or act as a defense to actions instituted by municipal or state regulatory agencies. No provision of this order shall be construed to imply that any past or future conduct of respondent complies with the rules and regulations of, or the statutes administered by, the Federal Trade Commission.

It is further ordered, That respondent shall notify the Commission at least thirty days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the respondent which may affect compliance obligations arising out of this order.

It is further ordered, That respondent shall, within sixty days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

AMREP CORPORATION

Docket 9018. Interlocutory Order, Aug. 10, 1977

General counsel directed to petition United States District Court (S.D.N.Y.) for grand jury testimony; and procedures established for *in camera* review by ALJ and access to testimony by counsel for both sides.

ORDER GRANTING REQUEST FOR APPLICATION TO UNITED STATES DISTRICT COURT FOR GRAND JURY TESTIMONY

In a report of August 2, 1976, the administrative law judge in this proceeding recommended that the Commission seek access to grand jury testimony presented by a prospective witness in this proceeding, Mr. Paul W. Heinz, in a criminal proceeding against this respondent, *United States* v. *Amrep Corp.*, No. 75 Cr. 1023 (S.D.N.Y.). We took that recommendation under advisement pending completion of the criminal proceedings in the expectation that Mr. Heinz' testimony would be turned over to respondent in those proceedings, 88 F.T.C. 457 (1976). The law judge, in a report of July 27, 1977, now informs us that respondent has not secured access to transcripts of the testimony, and the criminal case has concluded. Respondent requests access to the transcripts for their potential value in impeaching Mr. Heinz' prospective testimony. Accordingly,

It is ordered, That the Commission's General Counsel shall expeditiously petition the United States District Court for the Southern District of New York for discretionary release, pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, of all transcripts of grand jury testimony presented by Paul W. Heinz, in connection with *United States* v. *Amrep Corp.*, No. 75 Cr. 1023.

It is further ordered, That should any such transcripts be secured by the General Counsel acting on the Commission's behalf, they shall be delivered to the Administrative Law Judge in this proceeding, who shall review them *in camera* to determine whether they would be producible after direct examination of Mr. Heinz, under the standards in conformity with the Jencks Act which the Commission has established, *Ernest Mark High,* 56 F.T.C. 625, 632-633 (1959); *L. G. Balfour Co.,* 69 F.T.C. 1118 (1969); *Inter-State Builders, Inc.,* 69 F.T.C. 1152 (1969); *Star Office Supply Co.,* 74 F.T.C. 1595 (1968). Access may be granted to complaint counsel in advance of hearings to enable them to reassess whether to elicit testimony from Mr. Heinz. Access to respondent should be granted after direct examination of Mr.

Heinz if such transcripts are within the Commission's Jencks Act standards.

IN THE MATTERS OF

BRISTOL-MYERS COMPANY, ET AL. D. 8917

AMERICAN HOME PRODUCTS CORPORATION, ET AL. D. 8918

STERLING DRUG INC., ET AL. D. 8919

Dockets 8917, 8918, 8919. Interlocutory Order, Aug. 11, 1977

Denial of motion by complaint counsel for extension of time in which to file application for interlocutory appeal.

ORDER DENYING MOTION FOR EXTENSION OF TIME

Complaint counsel in these three related proceedings jointly move for an extension of time for filing with the Commission an application for interlocutory review under Section 3.23(a)(1) of our Rules of Practice. Applications for review under this provision are required to be filed "within five (5) days after notice of the Administrative Law Judge's ruling." The order from which counsel intend to appeal would grant respondents access to what are described as "two non-contemporaneous interview reports prepared by a staff attorney."

An extension of time is sought, in complaint counsel's words, "in order to seek appeal alternatively under Section 3.23(b) of the Rules," evidently because of counsel's view that the Administrative Law Judge would be inclined to rule that the question presented was suitable for interlocutory appeal. Delaying their filing under subsection (a)(1) until the filing under subsection (b) is due would assertedly "avoid the needless duplication in filing essentially identical motions before both the Commission and the Administrative Law Judge."

We have great difficulty in following complaint counsel's reasoning in this matter. An application for review under Section 3.23(a)(1) addresses itself directly to the Commission's discretion, without the necessity for a ruling by the Administrative Law Judge. On the other hand, no application may be filed with the Commission under Section 3.23(b) in the absence of:

> a determination by the Administrative Law Judge in writing, with justification in support thereof, that the ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy.

Even if such a determination is made, the decision whether or not to entertain an appeal would still be committed to the Commission's

discretion; that is, the posture of the appeal would in no way have been advanced by the additional time and effort involved in pursuing subsection (b) procedures.

Moreover, the granting of complaint counsel's request would make a nullity of the 5-day time limit contained in subsection (a). Similarly situated applicants could always seek subsection (b) certification as well as a subsection (a) appeal, thereby avoiding the time constraint. Because the time limitation serves the important purpose of reinforcing the ALJ's control over the orderly progress of adjudicative hearings, we cannot countenance such a result.

It is therefore ordered, That the motion is denied.

IN THE MATTER OF

TRW INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SECTION 8 OF THE CLAYTON ACT

Docket 9084. Complaint, June 17, 1976 — Decision, Aug. 11, 1977

This consent order, among other things, requires a Shaker Heights, Ohio firm, Addressograph-Multigraph Corporation, to cease interlocking directorates by seating on its board of directors any person who is simultaneously serving on the board of directors of any competitive company.

Appearances

For the Commission: *John Mendenhall* and *Paul Eyre.*

For the respondents: *Brent L. Henry* and *Robert H. Lawson, Jr., Jones, Day, Reavis & Pogue,* Cleveland, Ohio for TRW Inc. *Joseph D. McGrath,* Shaker Heights, Ohio for Addressograph-Multigraph Corporation.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents have been and are in violation of the provisions of Section 8 of the Clayton Act, as amended, and Section 5(a)(1) of the Federal Trade Commission Act, as amended, and that a proceeding in respect thereof would be in the public interest, issues this complaint, stating its charges as follows:

PARAGRAPH 1. Respondent TRW Inc. (hereinafter TRW), is an Ohio corporation and maintains its principal office at 23555 Euclid Ave., Cleveland, Ohio. TRW has capital, surplus, and undivided profits aggregating more than One Million Dollars ($1,000,000). TRW is engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, and is engaged in or its business affects commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 2. Respondent Addressograph–Multigraph Corporation (hereinafter Addressograph) is a Delaware corporation and maintains its principal office at 20600 Chagrin Boulevard, Shaker Heights, Ohio. Addressograph has capital, surplus, and undivided profits aggregating more than One Million Dollars ($1,000,000). Addressograph is engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, and is engaged in or its business affects commerce, as

"commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 3. Respondent Horace A. Shepard is an individual. His business address is the same as that of TRW.

PAR. 4. On or about April 29, 1969, respondent Horace A. Shepard was elected director and chief executive officer of TRW and has served in such capacities with TRW from on or about April 29, 1969, until the present. On or about November 4, 1971, respondent Horace A. Shepard was elected director of Addressograph and has served in such capacity with Addressograph from on or about November 4, 1971, until on or about November 6, 1975.

PAR. 5. During all or part of the period January 1, 1973 through and including November 6, 1975, the business of TRW and Addressograph included, but was not limited to, the manufacture, sale and distribution in commerce of point-of-sale credit authorization equipment and teller-operated bank transaction equipment, and other such equipment used for credit validation, check cashing validation, recording of deposits and withdrawals from financial institutions, and inventory recordkeeping.

PAR. 6. By the nature of their business as hereinabove described and location of operations with respect thereto, Addressograph and TRW were competitors, concurrent with respondent Horace A. Shepard's membership on the Boards of Directors of TRW and Addressograph, during part or all of the period January 1, 1973 through and including November 6, 1975, so that the elimination of competition by agreement between them would constitute a violation of the antitrust laws.

PAR. 7. The simultaneous membership of respondent Horace A. Shepard on the Boards of Directors of respondents TRW and Addressograph constitutes a violation of Section 8 of the Clayton Act, 15 U.S.C. 19, and Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having heretofore issued its complaint charging the respondent, Addressograph-Multigraph Corporation, named in the caption hereto, with violation of Section 8 of the Clayton Act, as amended, and Section 5(a)(1) of the Federal Trade Commission Act, as amended, and the respondent, Addressograph-Multigraph Corporation, having been served with a copy of the complaint and with a copy of the notice of contemplated relief accompanying said complaint; and

The respondent and counsel for the Commission having thereafter

executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by the respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter issued an order withdrawing the matter described in the caption hereto from adjudication for the purpose of considering the proposed consent agreement pursuant to Section 3.25 of its Rules; and

The Commission, having considered the agreement and having provisionally accepted same, and the agreement containing a consent order having thereupon been placed on the public record for a period of sixty (60) days and no comments having been received by the Commission, now in further conformity with the procedure prescribed in Section 3.25 of its Rules, the Commission hereby issues its decision in disposition of the proceeding against the above-named respondent, makes the following jurisdictional findings, and enters the following order:

1. Respondent Addressograph-Multigraph Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, maintaining an office at 20600 Chagrin Boulevard, Shaker Heights, Ohio.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding, and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That Addressograph-Multigraph Corporation, its successors and assigns, shall forthwith cease and desist from having, and in the future shall not have, on its board of directors any individual who serves as a director of any other corporation if Addressograph-Multigraph Corporation and such other corporation are, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.

II

It is further ordered, That within thirty (30) days of the date of

service of this order Addressograph-Multigraph Corporation shall review and retain, as to each member of its board of directors, a descriptive listing of all products and services produced or sold by each corporation of which such director serves, or has been nominated to serve, as a director. Such listing shall include the name and address of each corporation.

III

It is further ordered, That Addressograph-Multigraph Corporation, prior to each election of directors or to the solicitation of proxies for such election, shall review and retain, as to each member of its board of directors (except directors whose terms expire at the next election and who are not standing for re-election) and each nominee for a directorship (who is not then a director), a descriptive listing of all products and services produced or sold by each corporation of which such director or nominee serves, or has been nominated to serve, as a director. Such listing shall include the name and address of each corporation.

IV

It is further ordered, That Addressograph-Multigraph Corporation notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

V

It is further ordered, That Addressograph-Multigraph Corporation shall, within sixty (60) days after service upon it of this order, file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

AMERICAN HOME PRODUCTS CORPORATION, ET AL.

Docket 8918. Interlocutory Order, Aug. 18, 1977

Denial of complaint counsel's application for review of ALJ's order denying reconsideration of prior order which disallowed request for substitution of witnesses on previously submitted list.

ORDER DENYING APPLICATION FOR REVIEW

Complaint counsel here seek interlocutory review of a July 13, 1977 order by Administrative Law Judge Hyun, denying reconsideration of his June 14, 1977 order, which, in essence, disallowed a request for substitution of witnesses on a previously submitted list. Complaint counsel's application is filed notwithstanding the Administrative Law Judge's denial, by order of July 20, 1977, of a requested determination under Rules of Practice Section 3.23(b) which would have allowed interlocutory appeal.

Section 3.23 of our Rules, by its terms, exhausts the available avenues for interlocutory appeal to the Commission. Since no contention is or could be made that an appeal will lie in this case under subsection (a) of this section, and the requisite determination under subsection (b) was denied, there would appear to be no basis for entertaining the present application.

Complaint counsel nonetheless urge that the assertedly grave impact of the Administrative Law Judge's ruling invokes our "inherent power to review a ruling by an administrative law judge" even where the requirements of Section 3.23 are not met. As authority for the existence of such a power, they cite two rulings in *Kellogg Co., et al.,* reported at 83 F.T.C. 1756 (1974) and 86 F.T.C. 650 (1975). Both of these rulings dealt with applications, like the present one, premised upon our inherent power to review interlocutory rulings. In both instances the applications were denied. To be sure, there is language in both rulings indicating that review might be granted on a showing of clear abuse of discretion on the part of the Administrative Law Judge. 83 F.T.C. at 1758; 86 F.T.C. at 651. Another ruling in the same matter, reported at 86 F.T.C. 318, may be read as suggesting that a showing of irreparable harm to the appealing party is also requisite to its exercise. See 86 F.T.C. at 319, n. 1.

These tests are not met here. Moreover, the decision we are asked to review is peculiarly of the sort best left to the discretion of the Administrative Law Judge. Far from being an issue of "law or policy"

which we might appropriately resolve on interlocutory appeal, it goes to the heart of the Administrative Law Judge's duty to ensure that the hearing proceeds fairly and expeditiously.

It is therefore ordered, That the application is denied.

IN THE MATTERS OF

BRISTOL-MYERS COMPANY, ET AL. D. 8917

AMERICAN HOME PRODUCTS CORPORATION, ET AL. D. 8918

STERLING DRUG INC., ET AL. D. 8919

Dockets 8917, 8918, 8919. Interlocutory Order, Aug. 23, 1977

Order denying motion of complaint counsel for interlocutory review of ruling of Administrative Law Judge which granted respondents access to two reports of interviews with one of respondents' witnesses.

ORDER DENYING APPLICATION FOR INTERLOCUTORY APPEAL

Complaint counsel in these three proceedings apply for interlocutory review of the Administrative Law Judge's ruling granting access, in connection with a joint hearing to take testimony applicable to each case, to two reports, prepared by complaint counsel, of interviews with one of their witnesses. The application follows a ruling dated August 2, 1977, by the Administrative Law Judge determining that the question involved meets the standards for interlocutory review set out in Section 3.23(b) of our Rules of Practice.

This application for review was the subject of an earlier motion, filed July 29, 1977, entitled "Motion For Extension Of Time In Which To File Application For Interlocutory Appeal Under Section 3.23(a)(1)." It was urged that the Administrative Law Judge's order "required the disclosure of Commission records," in the terms of that portion of the Rule; and that characterization seems unassailable on the basis of the facts before us. We denied that motion because the only ground urged for an extension was complaint counsel's desire to seek appeal simultaneously under both subsection (a)(1) and subsection (b). We held that such a procedure:

> . . .would make a nullity of the 5-day time limit contained in subsection (a). Similarly situated applicants could always seek subsection (b) certification as well as a subsection (a) appeal, thereby avoiding the time constraint. Because the time limitation serves the important purpose of reinforcing the ALJ's control over the orderly progress of adjudicative hearings, we cannot countenance such a result.

This consideration applies with equal force to the present motion. Complaint counsel could have made application for review of the order in question under Section 3.23(a)(1), within the five-day period prescribed thereunder. They did not. We cannot now countenance the

circumvention of that time limit by granting an application under Section 3.23(b) for review of the same order.

It is therefore ordered, That the motion is denied.

IN THE MATTER OF

HEIRLOOM COLLECTION, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2898. Complaint, Aug. 25, 1977 — Decision, Aug. 25, 1977

This consent order, among other things, requires an Indianapolis, Ind. door-to-door seller of china, crystal, cookware, flatware, and linen, to cease violating the Truth in Lending Act by failing to provide to consumers, in connection with the extension of consumer credit, such disclosures as are required by Federal Reserve Board regulations. Further, the order requires the firm to make conspicuous disclosure of customers' refund rights in lay away plan agreements; to retain, without contractual obligations, merchandise until full cash payment is received; and where such purchase is revoked, to make prompt refund of all monies paid toward full cash price.

Appearances

For the Commission: *Richard A. Palewicz.*
For the respondents: *Thomas E. Tobin,* Indianapolis, Ind.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that the parties named in the caption hereof and more particularly described below and sometimes referred to hereinafter as respondents, have violated the provisions of said Acts, and the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent The Heirloom Collection, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its principal office and place of business located at 2424 East 55th St., Indianapolis, Indiana.

Respondent Future Enterprises, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana with its principal office and place of business located at 2424 East 55th St., Indianapolis, Indiana.

Respondent Linencrest, Inc. is a corporation organized, existing

and doing business under and by virtue of the laws of the State of Indiana with its principal office and place of business located at 2424 East 55th St., Indianapolis, Indiana.

Respondent George L. Douglass is an individual and an officer of respondent corporations. He formulates, directs and controls the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. His business address is the same as that of said corporate respondents.

PAR. 2. Respondents are now, and for some time last past have been engaged in the offering for sale, sale and distribution of china, crystal, cookware, flatware and linen to the general public.

PAR. 3. In the ordinary course and conduct of their business as aforesaid, respondents regularly extend consumer credit and are creditors as "consumer credit" and "creditors" are defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondents, Future Enterprises, Inc., and George L. Douglass, in the ordinary course and conduct of their business as aforesaid, in connection with credit sales, as "credit sale" is defined in Regulation Z, have caused and are causing customers to execute retail installment contracts which contain certain credit information. Said respondents do not provide these customers with any other consumer credit information. By and through the use of these contracts, respondents, Future Enterprises, Inc., and George L. Douglass:

1. Fail to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, using the term "deferred payment price," as required by Section 226.8(c)(8)(ii) of Regulation Z.

2. Fail to disclose the number, amount, and due date or periods of payments scheduled to repay the indebtedness, as required by Section 226.8(b)(3) of Regulation Z.

3. Fail to identify the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation and to state the amount or method of computation of any charge that may be deducted from the amount of any rebate of such unearned finance charge that will be credited to the obligation or refunded to the customer, as required by Section 226.8(b)(7) of Regulation Z.

4. Fail to disclose the "annual percentage rate" accurately to the nearest quarter of one percent, in accordance with Section 226.5, as required by Section 226.8(b)(2) of Regulation Z.

PAR. 5. Subsequent to July 1, 1969, respondents, The Heirloom

Collection, Inc., Linencrest, Inc., and George L. Douglass, in the ordinary course and conduct of their business as aforesaid, have caused and are causing customers to execute layaway contracts for the sale of merchandise. Under said contracts, customers agree to pay for merchandise in more than four installments. Also, under said contracts, said respondents retain the merchandise for most of their customers until the cash price is paid in full. The contracts do not, however, clearly and conspicuously give to customers the right to revoke the purchase at any time prior to full payment of the cash price and delivery of the merchandise, and to request and receive a full and prompt refund of any amounts paid toward the cash price of the merchandise. Said respondents' layaway sales are, therefore, credit sales as "credit sale" is defined in Regulation Z. By and through the use of their layaway contracts, respondents, The Heirloom Collection, Inc., Linencrest, Inc., and George L. Douglass:

1. Fail to disclose the price at which respondents, in the regular course of business, offer to sell for cash the property which is the subject of the credit sale, using the term "cash price," as required by Section 226.8(c)(1) of Regulation Z.

2. Fail to disclose the amount of any downpayment in money using the term "cash downpayment," as required by Section 226.8(c)(2) of Regulation Z.

3. Fail to disclose the difference between the "cash price" and the "cash downpayment," using the term "unpaid balance of cash price," as required by Section 226.8(c)(3) of Regulation Z.

4. Fail to disclose the sum of the "unpaid balance of cash price" and all other charges individually itemized, which are included in the amount financed but which are not part of the finance charge, using the term "unpaid balance," as required by Section 226.8(c)(5) of Regulation Z.

5. Fail to disclose the amount of credit extended, using the term "amount financed," as determined and required by Section 226.8(c)(7) of Regulation Z.

6. Fail to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, using the term "deferred payment price," as required by Section 226.8(c)(8)(ii) of Regulation Z.

7. Fail to disclose the number, amount, and due date or periods of payments scheduled to repay the indebtedness, as required by Section 226.8(b)(3) of Regulation Z.

8. Fail to disclose the sum of the payments scheduled to repay the indebtedness, using the term "total of payments," as required by Section 226.8(b)(3) of Regulation Z.

9. Fail to describe or identify the type of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and to clearly identify the property to which the security interest relates, as required by Section 226.8(b)(5) of Regulation Z.

10. Fail to identify the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation and to state the amount or method of computation of any charge that may be deducted from the amount of any rebate of such unearned finance charge that will be credited to the obligation or refunded to the customer, as required by Section 226.8(b)(7) of Regulation Z.

PAR. 6. Pursuant to Section 103(s) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Chicago Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of the Federal Trade Commission Act and the Truth in Lending Act and the regulation promulgated thereunder; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of such agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the

Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent The Heirloom Collection, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana with its principal office and place of business located at 2424 East 55th St., Indianapolis, Indiana.

Respondent Future Enterprises, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana with its principal office and place of business located at 2424 East 55th St., Indianapolis, Indiana.

Respondent Linencrest, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana with its principal office and place of business located at 2424 East 55th St., Indianapolis, Indiana.

Respondent George L. Douglass is an officer of each of the corporate respondents. He formulates, directs and controls the policies, acts and practices of said corporations and his address is the same as that of the corporate respondents.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents The Heirloom Collection, Inc., a corporation, Future Enterprises, Inc., a corporation, and Linencrest, Inc., a corporation, their successors and assigns, and their officers, and George L. Douglass, individually and as an officer of said corporations, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or any other device in connection with the extension or arrangement for the extension of "consumer credit" as defined in Regulation Z (12 C.F.R. 226) of the Truth in Lending Act (Pub. Law 98-321, 15 U.S.C. 1601, *et seq.),* do forthwith cease and desist from:

1. Failing to disclose the price at which respondents, in the regular course of business, offer to sell for cash the property which is the subject of the credit sale, using the term "cash price," as required by Section 226.8(c)(1) of Regulation Z.

2. Failing to disclose the amount of any downpayment in money, using the term "cash downpayment" as required by Section 226.8(c)(2) of Regulation Z.

3. Failing to disclose the difference between the "cash price" and the "cash downpayment," using the term "unpaid balance of cash price," as required by Section 226.8(c)(3) of Regulation Z.

4. Failing to disclose the sum of the "unpaid balance of cash price" and all other charges individually itemized, which are included in the amount financed but which are not part of the finance charge, using the term "unpaid balance" as required by Section 226.8(c)(5) of Regulation Z.

5. Failing to disclose the amount of credit extended, using the term "amount financed," as determined and required by Section 226.8(c)(7) of Regulation Z.

6. Failing to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, using the term "deferred payment price," as required by Section 226.8(c)(8)(ii) of Regulation Z.

7. Failing to disclose the number, amount, and due date or period of payments scheduled to repay the indebtedness, as required by Section 226.8(b)(3) of Regulation Z.

8. Failing to disclose the sum of the payments scheduled to repay the indebtedness, using the term "total of payments," as required by Section 226.8(b)(3) of Regulation Z.

9. Failing to describe or identify the type of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and to clearly identify the property to which the security interest relates, as required by Section 226.8(b)(5) of Regulation Z.

10. Failing to identify the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation and to state the amount or method of computation of any charge that may be deducted from the amount of any rebate of such unearned finance charge that will be credited to the obligation or refunded to the customer, as required by Section 226.8(b)(7) of Regulation Z.

11. Failing to disclose the "annual percentage rate" accurately to the nearest quarter of one percent in accordance with Section 226.5 as required by Section 226.8(b)(2) of Regulation Z.

12. Failing in any consumer credit transaction to make all disclosures that are required by Sections 226.4, 226.5, 226.6 and 226.8 of Regulation Z in the manner, form and amount specified therein.

Provided, however, that lay away plans shall not be considered extensions of credit subject to the provisions of Regulation Z if under such lay away plans: one, respondents retain the merchandise for the customer until the cash price is paid in full; two, the customer has no contractual obligation to make payments and may, at his option, revoke a purchase made under the plan and request and receive prompt refund of any amounts paid toward the cash price of the

merchandise; and, three, the customer receives a clear and conspicuous written disclosure contained in the lay away plan agreement of his right to a full refund.

It is further ordered, That the respondent corporations shall forthwith distribute a copy of this order to each of their operating divisions.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents engaged in the sale of the respondents' goods or services, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. In addition, for a period of ten years from the effective date of this order, the respondent shall promptly notify the Commission of each affiliation with a new business or employment. Each such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents, such as dissolution, assignment or sale resulting in the emergence of successor corporations, the creation or dissolution of subsidiaries or any other change in the corporations which may affect compliance obligations arising out of the order.

It is further ordered, That respondents maintain at all times in the future, for a period of not less than three (3) years, complete business records to be furnished upon request to the staff of the Federal Trade Commission, relative to the manner and form of their continuing compliance with all the above terms and provisions of this order.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

ITT CONTINENTAL BAKING COMPANY, INC., ET AL.

Docket C-2015. Interlocutory Order, Aug. 30, 1977

Denial of respondents' petition to reopen proceeding for modification of the consent order.

ORDER DENYING RESPONDENTS' PETITIONS TO REOPEN THE PROCEEDING FOR MODIFICATION OF CONSENT ORDER

Respondents ITT Continental and Bates, ITT's advertising agency, petition the Commission, pursuant to Rules of Practice Section 3.72(b), to reopen the above-styled proceeding for purposes of modifying in certain specified aspects Paragraph I.1 of the order entered on August 17, 1971. 79 F.T.C. 248, 254.

Petitioners assert that modification of the order is needed to permit them to conduct consumer tests so as to substantiate intended advertising claims with respect to a new bread product, "Fresh Horizons." However, nothing in the order precludes such testing. Petitioners further assert that Paragraph I.1 of the order is inconsistent with the First Amendment, as applied in the recent series of Supreme Court "commercial speech" cases. The issue of the order's applicability to a particular advertising claim is not before the Commission, however. A hypothetical construction of the order that suggests it might bar truthful, adequately substantiated claims does not justify modification at this time.

The Commission has determined that petitioners have failed to present adequate evidence that changed conditions of fact or law, or the public interest, requires modification of the order. Rules of Practice, Section 3.72(b)(2).

The aforesaid petition is accordingly denied, without prejudice to respondents' right to refile at an appropriate time.

It is so ordered.

IN THE MATTER OF

PREMIER CLOTHING CO., INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND WOOL PRODUCTS LABELING ACTS

Docket C-2899. Complaint, Aug. 31, 1977 — Decision, Aug. 31, 1977

This consent order, among other things, requires a New York City clothing manufacturer and distributor to cease misbranding and misrepresenting the wool and constituent fiber content of its products. The firm is also required to advise affected customers that the clothing they purchased was misbranded.

Appearances

For the Commission: *Martin Gorman.*
For the respondents: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Premier Clothing Co., Inc., a corporation, and Sidney Kreigler, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts and the rules and regulations promulgated under the Wool Products Labeling Act of 1939, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Premier Clothing Co., Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 120 Fifth Ave., New York, New York.

Respondent Sidney Kreigler is an officer of the corporate respondent. He formulates, directs, and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

Respondents are engaged in the importation, sale and distribution of clothing products including but not limited to men's and boys' coats.

PAR. 2. Respondents, now and for some time last past, have imported for introduction into commerce, manufactured for introduction into commerce, introduced into commerce, transported, distri-

buted, delivered for shipment, shipped, offered for sale, and sold in commerce as "commerce" is defined in the Wool Products Labeling Act of 1939, wool products as "wool product" is defined therein.

PAR. 3. Certain of said wool products were misbranded by the respondents within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were certain men's and boys' coats stamped, tagged, labeled, or otherwise identified by respondents as "100% cashmere," whereas, in truth and in fact, said products contained substantially different fibers and amounts of fibers than represented.

PAR. 4. Certain of said wool products were further misbranded by respondents in that they they were not stamped, tagged, labeled or otherwise identified as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the rules and regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were wool products, namely men's and boys' coats with labels on or affixed thereto, which failed to disclose the percentage of the total fiber weight of the said wool products, exclusive of ornamentation not exceeding 5 per centum of said total fiber weight, of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool, when said percentage by weight of such fiber was 5 per centum or more, and (5) the aggregate of all other fibers.

PAR. 5. The acts and practices of respondents as set forth above were, and are, in violation of the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices, in or affecting commerce, under the Federal Trade Commission Act, as amended.

PAR. 6. Respondents are now and for some time last past have been engaged in the manufacture, offering for sale, sale, and distribution of certain products, namely men's and boys' coats. In the course and conduct of their business as aforesaid, respondents now cause and for some time last past, have caused their said products, when sold, to be shipped from their place of business in the State of New York to purchasers located in various other States of the United States, and maintain and at all times mentioned herein have maintained, a substantial course of trade in said products in or affecting commerce,

as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 7. Respondents in the course and conduct of their business have made statements on invoices to their customers, misrepresenting the fiber content of certain of their products.

Among such misrepresentations, but not limited thereto, were statements setting forth the fiber content thereof as "100% cashmere" whereas, in truth and in fact, said products contained substantially different fibers and amounts of fibers than represented.

PAR. 8. The acts and practices set forth in Paragraph Seven have the tendency and capacity to mislead and deceive the purchasers of said products as to the true content thereof.

PAR. 9. The aforesaid acts and practices of the respondents as herein alleged in Paragraph Seven were, and are, all to the prejudice and injury of the public, and constituted, and now constitute, unfair and deceptive acts or practices in or affecting commerce, within the intent and meaning of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act, as amended, and the Wool Products Labeling Act of 1939; and,

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not consititute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and,

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the

Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Premier Clothing Co., Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 120 Fifth Ave., New York, New York.

Respondent Sidney Kriegler is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Premier Clothing, Co., Inc., a corporation, its successors and assigns, and its officers, and Sidney Kriegler, individually and as an officer of said corporation, and respondents' representatives, agents, and employees, directly or through any corporation, subsidiary, division, or any other device, in connection with the introduction, or importing for introduction, or manufacture for introduction, into commerce, or the offering for sale, sale, transportation, distribution, delivery for shipment or shipment; in commerce, of wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products by:

1. Falsely and deceptively stamping, tagging, labeling, or otherwise identifying such products.

2. Failing to securely affix to or place on each such product a stamp, tag, label, or other means of identification showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

It is further ordered, That respondents Premier Clothing Co., Inc., a corporation, its successors and assigns, and its officers and Sidney Kriegler, individually and as an officer of said corporation, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the importing, advertising, offering for sale, sale or distribution of men's and boys' coats in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from misrepresenting the character or amount of constituent fibers contained in such products on invoices or shipping memoranda applicable thereto, or in any other manner.

It is further ordered, That respondents mail a copy of this order by

registered mail to each of their customers that purchased the wool products which gave rise to this complaint.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of each change in business or employment status, which includes discontinuance of his present business or employment and each affiliation with a new business or employment, for ten (10) years following the effective date of this order. Such notice shall include respondent's current business address and a description of the business or employment in which he is engaged, as well as a description of his duties and responsibilities. The expiration of the notice provision of this paragraph shall not affect any other obligations arising under this order.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

COPCO, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2900. Complaint, Sept. 7, 1977 — Decision, Sept. 7, 1977

This consent order, among other things, requires a New York City importer and distributor of gourmet cookware, to cease establishing, maintaining, and enforcing price maintenance agreements, and requiring such agreements as a precondition to dealing; soliciting reports of price cutters, and threatening or terminating those dealerships. Respondent is additionally required to cease withholding earned advertising credits, and restricting dealers from selling goods to unauthorized customers or classes of customers. Further, the order mandates that respondent clearly disclose in pricing materials that such prices are merely "suggested," and maintain prescribed files for a period of three years.

Appearances

For the Commission: *William F. Connolly* and *Raymond J. McNulty.*

For the respondent: *Alan Weinschel, Weil, Gotshal & Manges,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Copco, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (38 Stat. 719, as amended; 15 U.S.C. 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Copco, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 11 East 26th St. New York, New York.

PAR. 2. Respondent has been and is now engaged in the manufacture, importation, distribution, and sale of cookware and related products, hereinafter referred to as said products. Said products are subsequently distributed and sold to retail dealers throughout the United States for resale to the general public.

PAR. 3. Respondent distributes and sells its products to retail

dealers (hereinafter referred to as dealers) located in all fifty states and the District of Columbia, through salespersons and sales representatives who act under the direction and control and carry out the policies of respondent.

PAR. 4. In the course and conduct of its business as aforesaid, respondent causes and has caused said products to be shipped from the state in which they are warehoused to purchasers in other states. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 5. Except to the extent that competition has been hampered, hindered, lessened or restrained as set forth in this complaint, respondent has been and is now in competition with other persons, firms, and corporations engaged in the manufacture, importation, sale, and distribution of said products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 6. Respondent, in combination, agreement or understanding with certain of its retail dealers, or with the cooperation or acquiescence of other of its dealers, has for the last several years been engaged in a course of action to fix, establish, and maintain, certain resale or retail prices at which said products are resold to the general public. In furtherance of said course of action, respondent has for the last several years been engaged in the following acts and practices, among others:

(a) Establishing agreements, understandings or arrangements with its dealers, as a condition precedent to the granting or retention of a dealership, that such dealers will maintain its suggested retail prices;

(b) Regularly furnishing its dealers with price lists and necessary supplements thereto containing certain resale or retail prices for said products;

(c) Informing its dealers, by direct and indirect means, that respondent expects and requires such dealers to maintain and enforce certain resale or retail prices, or such dealerships will be terminated;

(d) Requiring its dealers to agree not to sell or otherwise supply or furnish its products to other dealers;

(e) Soliciting and obtaining from its dealers cooperation and assistance in identifying and reporting any dealer who advertises, or offers to sell or sells said products at prices lower than certain resale or retail prices;

(f) Directing, soliciting or encouraging salespersons, sales represen-

tatives, and other employees or agents of respondent to secure and report information identifying any dealer who (1) advertises, offers to sell or sells respondent's products at prices below the retail prices suggested or established by respondent; or (2) sells respondent's products to other dealers;

(g) Contacting those dealers who fail to adhere to and maintain certain resale or retail prices for said products and securing, or attempting to secure, assurances from such dealers that they will adhere to and observe respondent's resale or retail prices;

(h) Threatening to terminate certain dealers who fail or refuse to observe and maintain respondent's suggested prices, or who advertise respondent's products at retail prices below the prices suggested by respondent.

PAR. 7. By means of such acts and practices, including but not limited to the foregoing, respondent, in combination, agreement or understanding with certain of its dealers, has established, maintained, and pursued a course of action to fix and maintain certain resale or retail prices at which said products will be resold.

PAR. 8. The aforementioned acts and practices of respondent have been and are now having the effect of hampering and restraining competition in the resale and distribution of said products, and constitute unfair methods of competition and unfair acts and practices in or affecting commerce, all in derogation of the public interest and in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Boston Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and

having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Proposed respondent Copco, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 11 East 26th St., New York, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

DEFINITION

Dealer – For purposes of this complaint and order, "dealer" is defined as any person, partnership, corporation or other business entity who purchases Copco products for resale.

ORDER

I

It is ordered, That respondent Copco, Inc., a corporation, its successors and assigns, and its officers, and respondent's agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device in connection with the manufacture, importation, distribution, offering for sale and sale of cookware and other merchandise in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

A. Establishing, maintaining or enforcing with any dealer any contract, agreement, understanding or arrangement fixing, establishing, maintaining, controlling or enforcing, directly or indirectly, the price at which any of said products is advertised, sold or offered for sale at retail.

B. Publishing, disseminating, circulating or providing by any other means, any retail price, unless the word "suggested" is clearly and conspicuously stated on each page of any price list, book, tag, advertising or promotional material or other document that contains a retail price. In addition, all written communications by Copco to dealers intended for internal dealer use shall clearly and conspicu-

ously contain the following disclosure, or a disclosure of similar import, on each page of any document that contains a retail price: "Suggested retail prices are suggestions only. Copco dealers are completely free to resell Copco merchandise at prices and to customers of their own choosing."

C. Requiring any dealer or prospective dealer to enter into an oral or written agreement or understanding that such dealer or prospective dealer will maintain any resale or retail price for any of said products as a condition of buying any of said products.

D. Prior to selling to a prospective dealer, requiring assurances, whether by understanding, agreement or otherwise, from such person or persons that they will adhere to and observe suggested resale or retail prices for said products.

E. Requiring, directly or indirectly, any dealer to resell to respondent any unsold stock of said products in the event that business relations between respondent and the dealer are terminated, *provided,* that respondent shall not be prohibited from repurchasing such unsold stock with the consent of the dealer, or where respondent has a "security interest" in said products or where the dealer is unable to meet its financial obligations to the respondent.

F. Requesting or requiring any dealer or prospective dealer, either directly or indirectly, to report any dealer who does not adhere to any resale or retail price for any of said products, or acting on reports so obtained by refusing or threatening to refuse sales to any dealer so reported.

G. Refusing or threatening to refuse any sale to any dealer for the reason that said dealer had been reported as not adhering to or observing any resale or retail price for any of said products.

H. Refusing or threatening to refuse any sale to any dealer, either directly or indirectly, or threatening to cancel or terminate, or canceling or terminating any dealer because of any resale or retail price observed, maintained or advertised by the dealer for any of said products.

I. Requiring, from any dealer charged with price cutting or failure to adhere to any resale or retail price, a promise or assurance to adhere to any resale or retail price for any of said products as a condition precedent to any future sales to said dealer.

J. Requiring or inducing by any means, any dealer or prospective dealer to refrain or to agree to refrain from reselling any of said products to any other dealer or distributor.

K. Requesting or requiring any salespersons, sales representatives, and any other employees or agents of respondent, either directly or indirectly, to report any dealer who does not adhere to any

resale or retail price for any of said products, or acting on reports so obtained by refusing or threatening to refuse sales to any dealer so reported.

L. Threatening to withhold or withholding earned cooperative advertising credits or allowances from any Copco dealer because said dealer advertises respondent's products at retail prices other than that which respondent deems appropriate or has approved.

M. Establishing, continuing or enforcing by refusal to sell, termination or threat thereof, delay in shipment or threat thereof, or in any other manner, any contract, agreement, understanding or arrangement or method of doing business which has the purpose or effect of restricting or limiting in any manner the customers or classes of customers to whom dealers may sell respondent's products.

N. Convening or participating in any meeting for the purpose of undertaking or engaging in any of the acts or practices prohibited by this order.

II

It is further ordered, That Respondent herein, during the three (3) year period of time following the effective date of this order, shall mail or deliver, and obtain signed receipts therefore, copies of this order to every present dealer and to all future dealers of said products at the time said dealers are opened as accounts.

III

It is further ordered, That respondent herein shall forthwith distribute a copy of this order to each operating division and subsidiary engaged in the manufacture, sale, and distribution of said products and to all officers and directors engaged in the manufacture, sale, and distribution of said products.

IV

It is further ordered, That respondent shall, within thirty (30) days from the date on which this order becomes final, mail or deliver, and obtain a signed receipt therefore, a copy of this order to all Copco sales personnel and Copco sales representatives engaged in the distribution, offering for sale or sale of said products.

V

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate

respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation of or dissolution of subsidiaries or any other such change in the corporation which may affect compliance obligations arising out of the order.

VI

It is further ordered, That the respondent herein, for a period of three (3) years from the date of this signing, establish and maintain a file of all records referring or relating to respondent's refusal to sell said products to any existing dealer, which file shall contain a record of any written communication to each such dealer explaining respondent's refusal to sell, and which file will be made available for Commission inspection on reasonable notice.

VII

It is further ordered, That the respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order.

IN THE MATTER OF

GENERAL MOTORS CORPORATION, ET AL.

Docket 9074. Interlocutory Order, Sept. 9, 1977

Denial of complaint counsel's application for review of various provisions of a protective order issued by the administrative law judge.

ORDER DENYING APPLICATION FOR REVIEW

Complaint counsel apply for review of various provisions of a protective order (as to respondent General Motors) issued by the administrative law judge on March 29, 1977. The law judge has not determined that interlocutory review would be appropriate under the Commission's Rules, Section 3.23(b), but complaint counsel contend that the Commission should nevertheless exercise its inherent authority to review a "clear abuse of discretion or the exceeding of delegated authority."

It appears that the protective order may contravene the general policy the Commission has consistently pursued regarding the protection of confidential business information. However, complaint counsel have offered no cogent reasons why the Commission should depart from the requirements of Section 3.23(b) and entertain this appeal in the absence of certification by the law judge. Complaint counsel state that they could "work under" the ALJ's order and it is apparent that respondent did not comply with the Commission's process on the condition that the protective order be entered. We therefore decline to review the protective order at this time. The question, of course, may be taken up at such time as the Commission is presented the ALJ's initial decision for review or, perhaps, on other occasions when the order is found to interfere with proper use of the documents in question.

The aforesaid application for review is accordingly denied.[1]

It is so ordered.

CONCURRING STATEMENT OF COMMISSIONERS COLLIER AND CLANTON

We concur in the Commission's disposition of this appeal for the procedural reasons set forth in the order. We reach this conclusion even though we believe it is clear that the protective order is a clear abuse of the ALJ's discretion. Among other things, the order purports to require prenotification of respondent General Motors before

[1] The Commission has determined to treat complaint counsel's application as timely filed.

release of information and to restrict access to documents without regard for the Freedom of Information Act (and at least to that extent is completely outside the law judge's authority), and requires unprecedented restrictions on the access of the Commission's employees and return of documents, without any explanation or findings on the record that such extraordinary treatment is necessary. In this case, however, and for reasons stated in the Commission's order, there is no showing that the ALJ's protective order works any irreparable prejudice on the rights of the parties or the public.

IN THE MATTER OF

ATLANTIC RICHFIELD COMPANY

Docket 9089. Interlocutory Order, Sept. 9, 1977

Denial of respondent's motion to dismiss complaint on ground that continued prosecution of action is not in the public interest.

ORDER DENYING RESPONDENT'S MOTION TO DISMISS COMPLAINT

The administrative law judge has certified to the Commission respondent's motion to dismiss the complaint on the ground that, because of changed circumstances, continued prosecution of this action is not in the public interest.

The Commission adheres to its view that this proceeding is in the public interest. The only changed circumstance cited in respondent's motion is the sale one month prior to consummation of the merger of its ownership interest in the Clay West Project, a producer of uranium oxide, to its joint venture partners. According to respondent, as a result of this sale, Atlantic Richfield and The Anaconda Company no longer competed with one another and complaint counsel will therefore be unable to prove the merger resulted in the elimination of actual competition. We do not decide the various legal and factual issues raised by respondent's mootness claim. However, the claim that the merger eliminated actual competition in the uranium oxide market is one of only three theories advanced in the complaint. Assuming, without deciding, that the actual competition theory has been mooted, we believe further proceedings with respect to the other two theories would still be warranted. As for respondent's argument that the two potential competition theories are "extremely weak," we believe that these theories can be assessed only on the basis of a full evidentiary record.

Respondent's motion to dismiss the complaint is accordingly denied.

It is so ordered.

IN THE MATTER OF

STERLING DRUG INC., ET AL.

Docket 8919. Interlocutory Order, Sept. 13, 1977

Denial of respondent Sterling Drug Inc. motion to dismiss portions of complaint concerning the product Cope, and affirmance of ALJ's ruling denying respondent's motion for partial summary decision.

ORDER

Respondent Sterling Drug Inc., ("respondent") (1) applies for interlocutory review of the administrative law judge's denial of its motion for summary decision with respect to the portions of the complaint concerning the product Cope; and (2) moves for dismissal of these portions of the complaint on the ground that further proceedings would not be in the public interest. The administrative law judge, by order dated June 7, 1977, authorized respondent to apply for interlocutory review of his denial of the summary decision motion[1] and certified to the Commission the motion to dismiss.[2]

Respondent argues that Cope is a minor product with a "miniscule" share of the analgesic market, that advertising of the product terminated more than five years ago and that there is "no possibility" the alleged violations will be repeated and, hence, "no basis for any relief, no matter what the outcome of a trial."[3] Respondent relies on an affidavit prepared by Mr. James Alberts, a company official, asserting that Cope advertising has been terminated and that "Sterling has no plans to advertise Cope in the foreseeable future and there is no reasonable expectation or possibility of any such advertising because of the same objective economic factors that led to termination more than five years ago."[4] Sterling also cites a recent announcement that the Food and Drug Administration has commenced an action that may lead to removal from the market of all daytime sedatives, including Cope, that are sold over-the-counter without prescriptions.[5]

Respondent contends that the summary decision motion should

[1] Rules of Practice, Section 3.23(b).

[2] Rules of Practice, Section 3.22(a).

[3] Motion of Sterling Drug Inc. to Dismiss Issues Related to the Product Cope on Public Interest Grounds; and Application for Interlocutory Appeal from the Denial of Respondent's Motion for Summary Decision 1,2.

[4] The affidavit accompanies respondent's motion for summary decision.

[5] Supplemental Memorandum. . ., June 24, 1977. We hereby grant respondent leave to file this memorandum and complaint counsel leave to file their reply.

An FDA advisory panel had found insufficient evidence to support a label claim that one of Cope's primary ingredients is safe and effective for daytime tension relief and allowed three years for the submission of adequate substantiation for tension relief claims. Respondent has also cited this action as supporting dismissal of the complaint.

have been granted because its discontinuance of advertising of Cope rendered the portions of the complaint concerning the product moot as a matter of law. The motion to dismiss asserts that further proceedings with regard to this product are, in any event, not in the public interest.

We affirm the ALJ's denial of respondent's summary decision motion. The law judge reasonably found that the affidavit offered by respondent did not contain an unqualified assurance that advertising for Cope would not be resumed under appropriate market conditions.[6] As for the recently announced FDA proceeding, the FDA indicated its intention to begin a "lengthy" process expected to result in the removal from the market of daytime sedatives such as Cope. The eventual outcome and its timing are, of course, uncertain.

Even if there was no possibility that respondent would resume its advertising of Cope,[7] "we would not be prevented on the ground of mootness from prohibiting closely related violations in the future." *Rubbermaid, Inc.*, 87 F.T.C. 676, 707 (1976), *appeal pending*, No. 76-1830 (6th Cir.). Violations found with regard to the product Cope might well justify order prohibitions against reasonably related practices respecting other Sterling products.[8]

We conclude for the same reasons that the public interest would not be served by the granting of respondent's motion to dismiss.

Respondent's motion to dismiss is accordingly denied and the administrative law judge's ruling denying respondent's motion for partial summary decision is affirmed.

It is so ordered.

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[6] We do not mean to suggest that we would necessarily be bound by an unqualified assurance. *See Fedders Corp.*, 85 F.T.C. 38 (1975), *aff'd.* , 529 F.2d 1398 (1976), *cert. denied*, 429 U.S. 818, 45 U.S.L.W. 3249 (Oct. 4, 1976).

[7] We do not reach complaint counsel's arguments about the relevance of claims that continue to be disseminated on Cope labels.

[8] *See FTC* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952).

Whether evidence concerning Cope might support order provisions that proof concerning other Sterling products might not support would depend on the nature and relative strengths of the evidence concerning the various products.

IN THE MATTER OF

GULF OIL CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket 9044. Complaint, July 15, 1975 — Decision, Sept. 13, 1977

This consent order, among other things, requires a Pittsburgh, Pa. seller of petroleum and other products to cease failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Federal Reserve Board regulations.

Appearances

For the Commission: *Howard F. Daniels, C. Lee Peeler* and *Hong S. Dea.*

For the respondent: *Frank W. Morgan,* Pittsburgh, Pa., *John E. Bailey* and *Catherine C. McCulley,* Houston, Texas.

COMPLAINT

Pursuant to the provisions of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Gulf Oil Corporation, a corporation, hereinafter referred to as respondent, has violated the provisions of said Acts and implementing regulation, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Gulf Oil Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal office and place of business located at 435 7th Ave., Pittsburgh, Pennsylvania.

PAR. 2. Respondent is now, and for some time in the past has been, engaged in the advertising, offering for sale, and sale of petroleum products and other merchandise to the public.

PAR. 3. In the ordinary course and conduct of its business as aforesaid, respondent regularly engages in credit sales, as "credit sale" is defined in Section 226.2(n) of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to October 28, 1974, respondent has caused to be

disseminated through the mails, advertisements, as "advertisement" is defined in Section 226.2(b) of Regulation Z, to aid, promote or assist directly or indirectly consumer credit sales of merchandise of various types. These consumer credit sales were repayable in more than four installments without the imposition of a separately stated finance charge. Certain of these advertisements have:

1. failed to state clearly and conspicuously, as required by Section 146 of the Truth in Lending Act, the disclosure that "The cost of credit is included in the price quoted for the goods and services;" and

2. by making representations such as "no charge for credit" and "no finance charge," supplied additional information which contradicts, obscures or detracts attention from the information required to be disclosed by Section 146, in violation of Section 226.6(c) of Regulation Z.

PAR. 5. Pursuant to Section 103(g) of the Truth in Lending Act, respondent's aforesaid failures to comply with the provisions of the Truth in Lending Act and Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondent has thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereto with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission issued, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent to all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having withdrawn the matter from adjudication for the purpose of considering the consent order; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, and having duly considered the comment filed thereafter pursuant to Section 2.34(b) of its Rules, the Commission hereby issues its complaint in the form contemplated by said

agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Gulf Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its office and principal place of business located at 435 7th Ave., Pittsburgh, Pennsylvania.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Gulf Oil Corporation, a corporation, its successors and assigns, and its representatives, agents and employees, directly or through any corporate or other device, in connection with any advertisement to aid, promote or assist directly or indirectly, any arrangement or extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. 226) of the Truth in Lending Act, (15 U.S.C. 1601-65 (1970)), *as amended,* (15 U.S.C. 1601-65a, (Supp. IV 1974)), do forthwith cease and desist from:

1. Failing in any advertisement to aid, promote, or assist directly or indirectly an extension of consumer credit repayable by agreement in more than four installments, unless a specific finance charge is or may be imposed, to state clearly and conspicuously: "THE COST OF CREDIT IS INCLUDED IN THE PRICE QUOTED FOR THE GOODS AND SERVICES," as required by Section 226.10(f) of Regulation Z.

2. Using in any advertisement to aid, promote or assist directly or indirectly an extension of consumer credit repayable by agreement in more than four installments, unless a specific finance charge is or may be imposed, any of the following statements:

YOU PAY NO FINANCE CHARGE . . .

THERE ARE NO FINANCE CHARGES . . .

NO CHARGE FOR CREDIT . . .

or using other statements of similar import and meaning PROVIDED, that respondent may use the statement:

there is no additional cost of credit or finance charge . . .

No additional finance charge. . .

No additional cost of credit. . .

No separate finance charge. . .

or other statements of similar import and meaning, when such statements are used in conjunction with the disclosure required by Section 226.10(f) of Regulation Z.

3. Supplying with the disclosures required by Section 226.10(f) of Regulation Z any additional information which is stated, utilized or placed so as to mislead or confuse the customer or contradict, obscure or detract attention from the disclosure required by Section 226.10(f) of the Regulation Z, in violation of Section 226.6(c) of Regulation Z.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions in the United States involved in the advertisement or extension of consumer credit.

It is further ordered, That the respondent herein shall within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

ITT CONTINENTAL BAKING COMPANY, INC., ET AL.

MODIFIED ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8860. Final Order, Oct. 19, 1973—Modified Order, Sept. 16, 1977

This modified order to cease and desist replaces an order dated October 19, 1973, 38 FR 31827, 83 F.T.C. 865, modified at 1105, 39 FR 1260, by adding a defense clause for the Ted Bates & Company, Inc., deleting Paragraphs I and III, and modifying Paragraph IV, to accord with the decision and judgment rendered by the Court of Appeals for the Second Circuit on March 1, 1976, 532 F.2d 207 (1976).

Appearances

For the Commission: *H. Robert Field.*

For the respondents: *Gordon A. Thomas* and *Alan C. Davis,* Rye, New York and *Covington & Burling,* Washington, D.C. for ITT Continental Baking Company, Inc.; *Donald J. Mulvihill, Cahill, Gordon, Sonnett, Reindell & Ohl,* Washington, D.C. and *Elhanan C. Stone,* New York City for Ted Bates & Company.

MODIFIED ORDER TO CEASE AND DESIST

Respondents having filed in the United States Court of Appeals for the Second Circuit on November 5, 1973, petitions to review an order to cease and desist issued herein on October 19, 1973; and the Court having rendered its decision and judgment on March 1, 1976, affirming and enforcing the Commission's order with the deletion of Paragraphs I and III, the modification of Paragraph IV, and the addition of a defense clause for respondent Ted Bates & Company, Inc.; and the time in which to file a petition for certiorari having expired without the parties having filed such a petition;

Now, therefore, It is hereby ordered, That the aforesaid order to cease and desist be, and it hereby is, modified in accordance with the decision and judgment of the Court to read as follows:

ORDER

I

It is ordered, That respondent, ITT Continental Baking Company, Inc., a corporation, and respondent, Ted Bates & Company, Inc., a corporation, their successors, assigns and respondents' officers, agents, representatives, and employees, directly or through any

corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any food product, do forthwith cease and desist from:

1. Disseminating, or causing the dissemination of, any advertisement by means of the United States mail or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which represents, directly or by implication, that any such product will contribute to the rapid or proper growth of children by providing dramatic or substantial benefits for such growth or development unless such product, by itself, will, in fact, make a significant contribution to such rapid or proper growth.

2. Disseminating, or causing the dissemination of, any advertisement by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, purchase of any such product in commerce, as "commerce" is defined in the Federal Trade Commission Act, which contains any of the misrepresentations prohibited in Paragraph 1 above.

II

It is further ordered, That respondent Ted Bates & Company, Inc., shall have a defense for false advertising representations under this order where it neither knew nor had reason to know that the representations were false.

III

It is further ordered, That respondents shall forthwith distribute a copy of this order to each of their operating divisions.

IV

It is further ordered, That each respondent notify the Commission, at least thirty (30) days in advance, of any proposed change in such corporate respondents such as dissolution, assignment or sale resulting in emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

V

It is further ordered, That each respondent shall, within sixty (60) days after service of this order upon it, file with the Commission a report in writing setting forth in detail the manner and form of its compliance with the order to cease and desist.

IN THE MATTER OF

MARCOR, INC., ET AL.

DISMISSAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND EQUAL CREDIT OPPORTUNITY ACTS

Docket 9092. Complaint, Nov. 23, 1976 — Dismissal Order, Sept. 20, 1977

This order dismisses, without prejudice, a complaint issued against a Chicago, Ill. corporation and its department store chain, for alleged violations of Federal Reserve Board regulation and the Federal Trade Commission Act, in connection with the extension of consumer credit. The complaint has been dismissed because newly-finalized amendments to Federal Reserve Board regulation necessitate further investigation as to firm's compliance with the amendments, and proceeding on the basis of the present complaint would be against the public interest.

Appearances

For the Commission: *Lewis H. Goldfarb.*

For the respondents: *Patrick Head* and *Karl J. Bemesderfer,* Chicago, Ill. *Joseph L. Gibson* and *Spencer H. Heine,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Equal Credit Opportunity Act, as amended, and its implementing regulation, Regulation B, and the Federal Trade Commission Act, the Federal Trade Commission, has reason to believe that Marcor Inc., a corporation, and Montgomery Ward and Company Inc., a corporation, ("respondents,") have violated the provisions of said Acts and regulation. It appears to the Commission that a proceeding by it in respect thereof would be in the public interest. The Commission hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. Respondent Marcor, Inc. ("Marcor") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business and office located at 619 West Chicago Ave., Chicago, Illinois.

Marcor wholly owns respondent Montgomery Ward and Company Inc. and formulates, controls and directs its policies, acts and practices, including the acts and practices set forth in Paragraphs Two through Six.

Respondent Montgomery Ward and Company, Incorporated, ("Montgomery Ward") a wholly-owned subsidiary of Marcor, is a

corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal place of business and office located at 619 West Chicago Ave., Chicago, Illinois. All references to "respondent" in Paragraphs Two through Five below will refer to Montgomery Ward.

PAR. 2. Respondent regularly extends credit to persons through the issuance of credit cards and through the use of retail installment contracts which enables those persons to purchase property or services from respondent and to defer payment therefor.

PAR. 3. Respondent regularly accepts applications for credit to determine which "applicants," as that term is defined in Regulation B, qualify for an extension of credit. When an application for credit is received by respondent, it is reviewed to determine whether, on the basis of the information provided therein, the applicant meets respondent's standards of creditworthiness also known as its "credit risk evaluation system."

PAR. 4. A substantial number of the applicants referred to in Paragraph Three fail to satisfy respondent's standards of creditworthiness and are informed by respondent that credit has been denied. A substantial number of these applicants subsequently request respondent to provide them with the reasons for the denial of credit as required by Section 202.5(m)(2) of Regulation B.

PAR. 5. In response to its applicants' requests for the reasons for denial, respondent furnishes a standard response (Attachment A) stating that it uses a "credit risk evaluation system" which assigns points to various items appearing on the credit application. The respondent further states that the applicant's total point score failed to meet respondent's minimum required point level and, for this reason, the applicant's request for credit was rejected. This response to its applicants' request for the reasons for denial constitutes a failure to provide applicants with the reasons for denial in violation of Section 202.5(m)(2) of Regulation B.

PAR. 6. Pursuant to Section 702(g) of the Equal Credit Opportunity Act, respondents' aforesaid failure to comply with Regulation B constitutes a violation of that Act, and pursuant to Section 704(c) thereof respondents have violated Section 5(a)(1) of the Federal Trade Commission Act.

ATTACHMENT A

[MONTGOMERY WARD LETTERHEAD]

This is in response to your request for a more detailed explanation of the reason for denial of your credit application request.

In considering credit applications, Montgomery Ward employs a "Credit Risk

Evaluation System" based upon our experience with thousands of applicants like yourself, over a period of years.

In this system, points are assigned to various items appearing on the credit application and added together to produce a total point score for the application. In your case, this score was below our minimum required level.

This is an economic decision, in no way should you construe it as a reflection on your personal integrity.

Sincerely yours,

/s/ J. Ebbert

Credit Manager

AD-4
34654

Order Dismissing Complaint

The Commission withdrew this matter from adjudication upon joint motion of the parties on April 19, 1977 for the purpose of considering a negotiated settlement. On June 28, 1977 the Commission rejected the proposed settlement and, having directed the staff to attempt further negotiations, was thereupon informed that such negotiations had proved unsuccessful.

Since the Commission originally issued its complaint in this matter on November 23, 1976, the Federal Reserve Board has finalized amendments to Regulation B (12 C.F.R. 202, *et seq.*) which bear directly on issues raised in the complaint. Having taken official notice of these changes in Regulation B and having been advised by staff that further investigation would be necessary to determine respondent's compliance with the regulation, as amended, the Commission has concluded that it is no longer in the public interest to conduct further proceedings on the basis of the complaint as presently drafted.

Accordingly, *it is ordered, sua sponte,* pursuant to Rule 3.25(f)(3), that the complaint in the above-captioned matter be dismissed without prejudice to any further action the Commission may deem appropriate, including direct enforcement of the provisions of Regulation B in Federal district court pursuant to section 704(c) of the Equal Credit Opportunity Act, as amended (15 U.S.C. 1691c(c)), and section 5(m)(1)(A) of the Federal Trade Commission Act, as amended (15 U.S.C. 45(m)(1)(A)).

In light of the Commission's action, respondent's motion to dismiss the complaint, filed on July 28, 1977, is denied as moot.

IN THE MATTER OF

SECURITY INDUSTRIAL LOAN ASSOCIATION

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket 9006. Complaint, Jan. 28, 1975 — Final Order, Sept. 21, 1977

This order, among other things, requires a Richmond, Va. finance company to cease failing to provide consumers, in connection with the extension of credit, relevant information and disclosures required by Federal Reserve Board regulations.

Appearances

For the Commission: *Bernard Rowitz* and *Alan L. Cohen.*
For the respondent: *Albert G. Seidman,* Port St. Lucie, Fla.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Security Industrial Loan Association, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Acts, and the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Security Industrial Loan Association is a corporation, organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia with its principal office and place of business located at 312 East Main St., Richmond, Virginia.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the lending of money to the general public directly and through brokers and finders.

PAR. 3. In the ordinary course and conduct of its business as aforesaid, respondent regularly extends consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

[2] PAR. 4. Subsequent to July 1, 1969, in the ordinary course of

business as aforesaid, respondent provides its customers with consumer credit cost disclosure statements.

By and through the use of the aforesaid consumer credit cost disclosures respondent:

1. Fails to include the broker's fee or finder's fee in the determination of the finance charge, as required by Section 226.4(a)(3) of Regulation Z.

2. Fails to disclose the broker's fee or finder's fee as a prepaid finance charge, as required by Section 226.8(e)(1) of Regulation Z, using the term "prepaid finance charge," as required by Section 226.8(d)(2) of Regulation Z.

3. Fails to itemize the components of the finance charge, as required by Section 226.8(d)(3) of Regulation Z.

4. Fails to disclose accurately the annual percentage rate computed in accordance with Section 226.5(b) of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

5. Fails to print the terms "finance charge" and "annual percentage rate" more conspicuously than other terminology, as required by Section 226.6(a) of Regulation Z.

6. Fails to disclose clearly the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation, as required by Section 226.6(a) of Regulation Z.

7. Fails to identify the broker as a creditor, as "creditor" is defined in Section 226.2(m) of Regulation Z, as required by Section 226.6(d) of Regulation Z.

PAR. 5. Pursuant to Section 103(q) of the Truth in Lending Act respondent's aforesaid failures to comply with the provisions of Regulation Z constitute violations of the Act and, pursuant to Section 108 thereof, respondent has thereby violated the Federal Trade Commission Act.

INITIAL DECISION BY LEWIS F. PARKER, ADMINISTRATIVE LAW JUDGE

MARCH 5, 1977

I. PRELIMINARY STATEMENT

The Commission's complaint in this proceeding issued on January 28, 1975, and charged respondent Security Industrial Loan Association (hereafter "SILA") with violating the Truth in Lending Act, 15 U.S.C. 1601, *et seq.* and Regulation Z, 12 C.F.R. 226, which was promulgated by the Board of Governors of the Federal Reserve System pursuant to authority granted by the Act.

The complaint alleges that SILA lends money to the general public directly and through brokers and finders and regularly extends consumer credit as that term is defined in Regulation Z and that through the use of [2] consumer credit cost disclosure statements it has violated the Truth in Lending Act and the Federal Trade Commission Act by:

1. Failing to include the broker's fee or finder's fee in the determination of the finance charge, as required by Section 226.4(a)(3) of Regulation Z.[1]

2. Failing to disclose the broker's fee or finder's fee as a prepaid finance charge, as required by Section 226.8(e)(1) of Regulation Z, using the term "prepaid finance charge," as required by Section 226.8(d)(2) of Regulation Z.

3. Failing to itemize the components of the finance charge, as required by Section 226.8(d)(3) of Regulation Z.

4. Failing to disclose accurately the annual percentage rate computed in accordance with Section 226.5(b) of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

5. Failing to print the terms "finance charge" and "annual percentage rate" more conspicuously than other terminology, as required by Section 226.6(a) of Regulation Z.

6. Failing to disclose clearly the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation, as required by Section 226.6(a) of Regulation Z.

7. Failing to identify the broker as a creditor, as "creditor" is defined in Section 226.2(m) [3] of Regulation Z, as required by Section 226.6(d) of Regulation Z.

SILA filed its answer on April 23, 1975 denying all material allegations of the complaint. Prehearing conferences were held on May 13 and August 14, 1975, and evidentiary hearings were conducted on November 3, 4 and 5, 1975. Complaint counsel and counsel for SILA submitted proposed findings of fact and conclusions of law on or about January 14, 1976 and replies on or about February 4, 1976.

The following findings of fact, conclusions of law and order are based upon my evaluation of the whole record and the proposed findings and conclusions of law and replies filed by both parties. Proposed findings not adopted either verbatim or in substance are rejected either because they are irrelevant or because they are not supported by the record.

---

[1] Although Regulation Z was amended effective October 28, 1975, this was after the complaint issued. Therefore, all references are to those regulations which were amended and issued on September 30, 1974.

II. Findings of Fact

1. SILA is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its office and principal place of business located at 312 East Main St., Richmond, Virginia (Ans. Par. I).[2]

2. SILA was incorporated pursuant to the provisions of the Industrial Loan Associations Act of the Commonwealth of Virginia and conducts its business subject thereto and under the inspection and supervision of the State Banking Commission (Tr. 26, 61; RX 2). It is engaged in first [4] and second mortgage financing of residential properties and makes loans to homeowners, primarily for debt consolidation (Tr. 26). Finance charges are imposed in these transactions (CXs 1–39). The volume of loans made by SILA was between $10,000,000 and $11,000,000 in 1973 and approximately $7,000,000 in 1974. SILA does business throughout Virginia, but conducts none outside of the Commonwealth (Tr. 27).

3. Respondent regularly extends "consumer credit" as that term is defined in Regulation Z, the implementing regulation of the Truth in Lending Act (Ans. Par. III).

4. Homeowners wanting loans from SILA apply either directly in person, by telephone or by letter, or are referred to it by small loan companies or savings and loan associations. Homeowners can also obtain loans from SILA through the services of mortgage brokers who submit applications on behalf of their clients (Tr. 28).

5. Mortgage brokers are not licensed or regulated by the Commonwealth of Virginia (Tr. 188–89) and the fee which they charge their clients is not established by statute. Although it often ranges between 9 and 10 percent of the loan proceeds (Tr. 95), there is no uniform fee which brokers charge; this is subject to negotiation between broker and borrower (Tr. 85, 96, 189; CXs 167, 172). In some instances, the fees are renegotiated at the time the loan is closed so that the broker will receive less than originally agreed upon (Tr. 89, 107, 154).

6. In a typical transaction involving a broker, SILA receives from the broker an application executed by his client. The broker also forwards a package including a credit report from the local credit bureau, a first mortgage verification form if there is such a mortgage,

[2] Abbreviations used in this decision are:
Tr. – Transcript of testimony
CX – Commission Exhibit
RX – Respondent's Exhibit
Ans. – Respondent's Answer to the Complaint
CPF – Complaint counsel's proposed findings
RPF – Respondent's proposed findings

title information, a copy of the fire insurance policy on the property, an independent appraisal of the property and a covering letter listing all of the enclosures (Tr. 30, 75, 185).

7. The covering letters placed in evidence are forms suggested by SILA (Tr. 42) and were used by at least two brokers in submitting loan applications to it (J. L. Levinson, CXs 85–90, 92–96, Tr. 77; Roy Hansen, CX 91). SILA has also issued rate books to brokers so that they can compute the charges it imposes on loans (Tr. 42, 184–85). [5]

8. If a SILA loan officer approves a loan, SILA informs the broker, when one is involved, of the terms and conditions of the loan and the name of the attorney who will close the loan. The closing attorneys are selected by SILA's general counsel (Tr. 31–32, 122–23, 251). If the closing is to take place in Richmond, the general counsel handles it (Tr. 119–20, 218). If the closing is to take place outside of Richmond, the general counsel forwards the loan papers to a selected local closing attorney under cover of a "forwarding sheet" which gives him instructions of a general nature and, depending on the individual loan, special instructions, including directions to pay some of the borrower's bills out of the loan proceeds (Tr. 34; CXs 40–50). Included in the loan papers which are sent to the closing attorneys are copies of SILA's Truth in Lending disclosure statements (Tr. 32).

9. One broker, Mr. Levinson, testified that it was his policy to send to SILA his broker's fee agreement which indicates the fee he will charge his client if a loan is approved and closed (Tr. 83; see *e.g.*, CX 87). However, it is not clear whether Mr. Levinson's policy was uniformly carried out by his office staff (Tr. 86–91). Although SILA's general counsel remembered seeing some broker's agreements in closed files in his office, he recalled no instance in which they were furnished to out-of-town closing attorneys (Tr. 119–20, 131–32). No other brokers give copies of their fee agreements to SILA (Tr. 45–46, 48, 52–53, 113, 132, 190–91, 209, 228).

10. The closing attorneys, whether they are SILA's general counsel or local counsel, are usually sent a copy of the broker's fee agreement by the broker since it is general practice to pay that fee out of the proceeds of the loan (Tr. 86, 103, 149–50, 156, 187, 206, 221). The closing attorneys also receive copies of Truth in Lending disclosure statements from some brokers (Tr. 193–94, 206). Other brokers do not furnish disclosure statements to the closing attorney (Tr. 79, 104).

11. The closing attorney conducts a title search on the property which will secure the loan and then communicates with the borrower to arrange a convenient time for settlement (Tr. 137, 168, 205–06). [6]

12. At settlement, the closing attorney explains SILA's disclosure

statement, delivers a copy to the borrower and has him sign one to be returned to SILA. He also gives the borrower notice of his right to rescind and a form of election not to rescind which is to be returned by the borrower in three days. The attorney then explains the terms of the loan and has the borrower execute the deed of trust. The attorney asks the borrower to endorse SILA's check and after it is endorsed, deposits it in an escrow account either before or after the rescission period expires (Tr. 104–08, 168, 206–07, 210).

13. Some time after the expiration of the rescission period, if the borrower has not elected to rescind, the closing attorney disburses the loan (Tr. 105, 150, 207) in accordance with SILA's instructions (Tr. 104, 109, 113, 167, 169, 210, 242) which generally require the attorney to make certain payments to the borrower's creditors (as consented to by the borrower) and to pay the balance to the borrower (Tr. 113–14, 169, 210, 242).

14. In some cases, closing attorneys will draw checks from the balance of the proceeds at the borrower's request to pay outstanding debts, including the loan broker's fee (Tr. 114, 169, 211, 242–43).

15. After the closing, the attorney transmits to SILA the executed note, recorded deed of trust, the signed disclosure statement, rescission notice and election not to rescind, and a title policy, if required (Tr. 105–06, 207, 224). Three closing attorneys testified that they did not send respondent any statement showing how the proceeds of the loan were disbursed (Tr. 181, 207–08, 224); the fourth said that he sent such statements to SILA (Tr. 106). These statements show payments of their fee to brokers out of the loan proceeds (CXs 51–84).

16. Before the Truth in Lending Act was implemented, SILA directed loan brokers not to send their fee agreements to it (Tr. 70–71). SILA's general counsel told its closing attorneys that it would not authorize them to pay any broker's fee (RXs 3, 4) but did not discourage them from following the borrower's instructions: [7]

> This does not mean that our office as well as other attorneys who close for Security will not cooperate if, at closing, there are delivered written directions signed by the borrower to withhold a given sum from the loan proceeds (RX 3).
>
> If a client or a broker tenders a duly executed disbursement authority, this obligation should be honored as any other that a client may request be paid from the proceeds of the loan (RX 4).

17. SILA's disclosure statements do not list the broker (where one is involved) as a creditor, do not list the broker's fee as a prepaid finance charge, do not include the fee as a component of the finance

charge and do not include the fee as a component in computing the annual percentage rate (hereafter APR) (Tr. 6, 10; CXs 1–39; RX 1).

18. If the broker's fee had been included in computing SILA's APR, the APR would have been greater than that actually disclosed in SILA's statements (CX 217).

19. R.S. Jessie, acting Commissioner of Banking for Virginia, testified that under the statute relating to industrial loan associations, if SILA added the broker's fee in computing the APR, it would indicate to his examiners a prima facie violation because the APR would exceed the rate of interest allowed industrial loan associations (Tr. 291–301; CX 217). However, if it were clear that SILA was including the broker's fee as part of the APR for purposes of informing the borrower and was not actually imposing the fee as a condition for the loan, Mr. Jessie said no action would be taken even though technically SILA's disclosure statements revealed an APR higher than that allowed by statute (Tr. 308).

20. SILA's disclosure statements which were used between July 1, 1969 and March 13, 1974 did not have the terms "finance charge" and "annual percentage rate" printed thereon more conspicuously than all other terminology (CXs 1–39). [8]

21. Since March 14, 1974, SILA's disclosures statements have had the terms "finance charge" and "annual percentage rate" printed thereon more conspicuously than all other terminology (RX 1).

22. From July 1, 1969 through March 13, 1974, respondent's disclosure statements contained the following language:

> Borrower shall have the right to anticipate payment of this debt at any time and shall receive a rebate for any unearned interest, which rebate shall be computed in accordance with the Standard Rule of 78 and shall be reduced by an anticipation premium equal to that portion of the contract interest allocable under such Rule to the next six payments (CXs 1–39).

This language repeats that of the Virginia statute governing the conduct of and rates that may be charged by industrial loan associations (RX 2).

23. Since March 14, 1974, respondent's disclosure statements have contained the following language:

> Prepayment:
>
> Borrower shall have the right to anticipate (prepay) this loan at any time and shall receive a rebate of the unearned interest portion of the FINANCE CHARGE computed in accordance with the Standard Rule of 78 less an anticipation (prepayment) premium equal to that portion of the contract interest allocable under such Rule to the next six payments (RX 1; Tr. 55).

24. No customers of SILA testified in this proceeding and there is

therefore no evidence that the language quoted in findings 23 and 24 is or was unclear to borrowers and that borrowers are or were unaware of their right to prepay loans obtained from SILA. [9]

III. Conclusions of Law

A. FAILURE TO INCLUDE THE BROKER'S FEE IN THE DETERMINATION OF THE FINANCE CHARGE

Brokers who obtain loans for their clients from SILA are arrangers for the extension of consumer credit[3] and are therefore creditors under Regulation Z, as is SILA which extends consumer credit.[4]

SILA does not include the broker's fee in the determination of its finance charge (Finding 17), and the complaint alleges that it has violated Section 226.4(a)(3) of Regulation Z which includes loan fees, points, finder's fees, or similar charges in the definition of finance charges.

However, this section does not require disclosure of any information; it simply defines those charges which are "finance charges" and which must be disclosed pursuant to other sections. The enumerated charges are "finance charges" only if they are

> . . . payable directly or indirectly by the customer, and imposed directly or indirectly by the creditor as an incident to or as a condition of the extension of credit. . . . (Section 226.4(a).)

[10] Since brokers are creditors and impose their fees on their customers incident to the extension of credit by SILA, it can be argued that these fees are finance charges under Section 226.4(a)(3), but this section, contrary to the complaint allegation, does not require the other creditor, SILA, to disclose the broker's fee as part of the finance charge in its Truth in Lending statements. However, since Section 226.4(a)(3) defines the broker's fee as a finance charge, complaint counsel argue that another part of Regulation Z, Section 226.6(d), imposes an obligation upon the lender to disclose the fee in his Truth in Lending statements.

This section states:

> If there is more than one creditor in a transaction, each creditor shall be clearly identified and shall be responsible for making *only* those disclosures required by

[3] Section 226.2(f):
" 'Arrange for the extension of credit' means to provide or offer to provide consumer credit which is or will be extended by another person under a business or other relationship pursuant to which the person arranging such credit receives or will receive a fee, compensation, or other consideration for such service. . . ."

[4] Section 226.2(m):
" 'Creditor' means a person who in the ordinary course of business regularly extends or arranges for the extension of consumer credit. . . ."

> this Part which are within his knowledge *and* the purview of his relationship with the customer (emphasis added).

In Letter No. 699, *CCH Consumers Credit Guide,* ¶30,996 (1973), the staff of the Federal Reserve Board stated that a loan broker's fee should be disclosed by the lender if he knows the amount of the fee.

In my decision in *Virginia Mortgage Exchange,* F.T.C. Dkt. 9007 (Initial Decision, August 18, 1975 [87 F.T.C. 182]), I refused to give any weight to this staff interpretation because, in my opinion, it failed to recognize the distinction between the "knowledge" and "purview" requirements but treated them as synonymous. *Id.* at p. 8.

I held in that proceeding that although the name of the lender was known by the broker, such knowledge was not within the purview of the relationship between the broker and his customer because it was not a legally significant aspect of that relationship. I decided, therefore, that the lender's name need not be revealed by the broker to the borrower. I also found that the broker need not reveal to the borrower the lender's method of computing the unearned portion of the finance charge in the event of prepayment of the loan. I reasoned that while the broker knew the lender's method of computing the unearned portion of the finance charge, that knowledge was not an essential aspect of the [11] relationship between the broker and his customer and was not within the purview of that relationship.

The Commission recently reversed by decision, *Virginia Mortgage Exchange,* F.T.C. Dkt. 9007 (Feb. 10, 1976) and entered an order which, *inter alia,* requires the broker to reveal to his customer the name of the creditor and to disclose the creditor's method of computing the unearned portion of the finance charge in the event of prepayment. The Commission disagreed with my interpretation of the word "purview" and held that:

> In our view, all terms of a given loan fall within the "purview" or "scope" of the relationship between a customer and the broker who arranges that loan (p. 4) [87 F.T.C. at 198].

The Commission held that its construction of Section 226.6(d) is the one which is most consistent with the Truth in Lending Act since the purpose of the Act is "to ensure full disclosure of credit terms in situations involving brokered loans as well as those negotiated by a borrower directly with a lender" (p. 7) [87 F.T.C. at 200].

SILA is aware at some point before it offers to extend credit that its potential customer hired a broker to find a willing lender (Finding 4) but since there is no fixed brokerage fee, it does not know how much the broker will charge for his services (Findings 5, 9). Even if the broker disclosed his fee to the lender prior to closing, SILA's

disclosure of the fee might be inaccurate since the fee may be adjusted at closing (Finding 5).

These practical difficulties may be ignored, according to complaint counsel, because the closing attorney is SILA's agent, and everything which he knows about the transaction, including the broker's fee which is often paid out of the loan proceeds (Finding 10), can be imputed to his principal—in other words, that SILA has constructive if not actual knowledge of the amount of the broker's fee (CPF, pp. 5–6). However, they cite no authority for the proposition that everything which is revealed to the closing attorneys can be imputed to SILA. The general rule is to the contrary. A principal is

> chargeable with, and bound by, the knowledge of or notice to his agent received while the agent is acting as such within the scope of [12] his authority and in reference to a matter over which his authority extends. 3 *Am. Jur. 2d Agency* §273 (1962). See also §276.

Before the Truth in Lending Act was implemented, SILA informed its attorneys that it would not authorize them to pay broker's fees (Finding 16) and since that time, payment of broker's fees out of the proceeds of the loan has been at the direction of the borrower, not SILA (Finding 14). Thus, if the broker's fee is paid by the closing attorney, that action is not within the scope of his express authority from SILA and his knowledge of the exact amount of the fee is not chargeable to SILA according to the law of agency.

Nevertheless, I am bound by the Commission's decision in *Virginia Mortgage Exchange, supra,* and I find that the amount of the broker's fee, since it can be easily discovered by SILA's closing attorneys, should be disclosed in its Truth in Lending statements. The overriding purpose of the Truth in Lending Act is full disclosure and in carrying out that purpose, the word "knowledge" should be given as expansive a construction as possible consistent with fairness. There is nothing unfair in requiring SILA to direct the closing attorneys to include the broker's fee in SILA's disclosure statements.

Furthermore, according to the Commission decision in *Virginia Mortgage Exchange, supra,* knowledge of the broker's fee can be viewed as being within the purview of the relationship between SILA and its customers because "[a]ny interpretation of Section 226.6(d) must take into account the manifest purpose of the law to ensure full disclosure of credit terms in situations involving brokered loans. . . ." (p. 7 [87 F.T.C. at 200].)

While this interpretation may be somewhat inconsistent with the ordinary meaning of the words "knowledge" and "purview," it seems to me that if, as the Commission held in *Virginia Mortgage Exchange,*

supra, it is necessary under Regulation Z for the broker to disclose the name of the lender even though the borrower already knows his name, it is even more essential for the borrower to have the broker's fee revealed to him on the lender's disclosure statement because the fee is, according to Regulation Z, a component of the total finance charge. [13]

B. FAILURE TO DISCLOSE THE BROKER'S FEE AS A PREPAID FINANCE CHARGE

Section 226.8(e)(1) of Regulation Z requires the disclosure of

> Any finance charge paid separately, in cash or otherwise, directly or indirectly to the creditor or with the creditor's knowledge to another person, or withheld by the creditor from the proceeds of the credit extended.

According to Section 226.8(d)(2), the charges must be disclosed as a "prepaid finance charge."

Complaint counsel argue that since the broker's fee is a finance charge, these sections require SILA to disclose such charge on its Truth in Lending statements (CPF, p. 12). Section 226.8(a) requires that disclosures such as those referred to in Sections 226.8(e)(1) and 226.8(d)(2) be made "in accordance with §226.6 and to the extent applicable. . . ."

My discussion of the "knowledge" and "purview" requirements of Section 226.6(d) in part A, *supra,* is applicable here. Since the broker's fee is within the knowledge of SILA and the purview of its relationship with its customers, the fee must be disclosed on its Truth in Lending statements as a prepaid finance charge.

C. FAILURE TO ITEMIZE THE COMPONENTS OF THE FINANCE CHARGE

Section 226.8(d)(3) requires the disclosure of

> . . .the total amount of finance charge, with description of each amount included, using the term "finance charge."

Since SILA does not include the broker's fee in computing its finance charge (Finding 17), complaint counsel argue that it has failed correctly to disclose the total amount of the finance charge as required by this section (CPF. p. 12). However, Section 226.8(a), the general rule which requires the disclosures enumerated in the specific following sections such as 226.8(d)(3), only requires them [14] to the extent they are called for by Section 226.6. As in parts A and B above, the issue, thus, is what information must be disclosed pursuant to Section 226.6(d). For the same reasons which I gave in

parts A and B, *supra,* I find that SILA must list the broker's fee in its disclosure statements when itemizing the components of its finance charge.

D. FAILURE TO DISCLOSE ACCURATELY THE ANNUAL PERCENTAGE RATE

SILA does not include the broker's fee as a component in computing its APR and the APR which is disclosed to its customers is therefore less than if the broker's fee were included (Findings 17–18).

Section 226.8(b)(2) of Regulation Z requires, with exceptions not applicable here, the disclosure of the creditor's finance charge expressed as an annual percentage rate using that term. Sections 226.5(b)(1) and (2) require disclosure of the APR with an accuracy at least to the nearest quarter of one percent and if SILA must include the broker's fee as a component of the finance charge, the difference between the true APR and that actually disclosed by SILA would exceed the tolerance level established by Sections 226.5(b)(1) and (2) (CX 217).

Since the multiple creditor provision of Regulation Z (Section 226.6(d)) controls the disclosures required by Section 226.8(b)(2), SILA has failed to disclose accurately the APR because the broker's fee is within its knowledge and the purview of its relationship with its customers.

E. FAILURE TO IDENTIFY THE BROKER AS A CREDITOR

According to Section 226.2(m) of Regulation Z, the brokers involved in the transactions herein are "creditors." Although SILA does not disclose them as creditors on its Truth in Lending statements (Finding 17), it knows when brokers are involved in a given transaction and knows their names (Findings 4, 6), and it could, with no inconvenience, disclose this information to its borrower-customers if Regulation Z required such disclosure. [15]

Section 226.6(d) states that if there is more than one creditor in a transaction, "each creditor shall be clearly identified" but only if the "disclosures required by this Part" are "within his knowledge and the purview of his relationship with the customer."

The knowledge requirement of this section is met, and applying the reasoning of the Commission's decision in *Virginia Mortgage Exchange,* the name of the broker is within the purview of the relationship between lender and borrower. Therefore, SILA should have revealed the broker's name as a creditor in its disclosure statements.

F. FAILURE TO PRINT THE TERMS "FINANCE CHARGE" AND "ANNUAL PERCENTAGE RATE" MORE CONSPICUOUSLY THAN OTHER TERMINOLOGY

SILA's disclosure statements which were in use between July 1, 1969 and March 13, 1974 did not have the terms "finance charge" and "annual percentage rate" printed thereon more conspicuously than all other terminology (Finding 20). Therefore, SILA has not complied with Section 226.6(a) of Regulation Z:

> Except with respect to the requirements of §226.10, where the terms "finance charge" and "annual percentage rate" are required to be used, they shall be printed more conspicuously than other terminology required by this Part. . . .

SILA agrees that the disclosure statements it employed until March 14, 1974 had other terms printed in the same size type as "finance charge" and "annual percentage rate" but argues that these deficiencies were minor in nature and highly technical (RPF, p. 10).

The language of much of Regulation Z is highly technical because it deals with a complex subject but the requirements of Section 226.6(a) are clear, precise and cannot be misinterpreted. While SILA's failure to comply with this section may have been inadvertent and, in that sense, was "technical," this is not a consideration which excuses it from liability. See *Certified Building Products, Inc.*, F.T.C. Dkt. 8875 (Oct. 5, 1973), *aff'd., Thiret* v. *FTC*, 512 F.2d 176 (10th Cir. 1975). [16]

> The ALJ's curious distinction between technical and substantive violations of this law can find neither support nor refuge in the statutory framework and purpose of the act and implementing regulations.

G. FAILURE TO DISCLOSE CLEARLY THE METHOD OF COMPUTING THE UNEARNED PORTION OF THE FINANCE CHARGE IN THE EVENT OF PREPAYMENT

Section 226.6(a) of Regulation Z sets forth the general rule that the disclosures required by other sections

> shall be made clearly, conspicuously, in meaningful sequence, in accordance with the further requirements of this section, and at the time and in the terminology prescribed in applicable sections.

SILA permits its customers to anticipate, or prepay, their loan at any time and receive a rebate for any unearned interest. However, there is a prepayment penalty which reduces this rebate. This rebate is:

> computed in accordance with the Standard Rule of 78 and shall be reduced by an

anticipation premium equal to that portion of the contract interest allocable under such Rule to the next six payments.

The quoted language was used in SILA's disclosure statements prior to March 14, 1974 (Finding 22). Although there is no evidence of how consumers might have interpreted this language (Finding 24), I can infer what it meant to the average consumer when it was used in SILA's disclosure statements. *E.g., FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 386 (1965); *J. B. Williams Co.* v. *FTC*, 381 F.2d 884, 890 (6th Cir. 1967), *cert. denied*, 352 U.S. 956 (1967).

While the quoted language might have revealed to the borrower that he could prepay his debt, this would have been much clearer if instead of using the phrase "anticipate [17] payment," SILA had stated: "Borrower shall have the right to prepay this loan. . . ."[5]

Furthermore, it is probable that even if the average consumer was aware that he could prepay the loan, SILA's prior disclosure statements did not reveal to him that his rebate would be reduced by a penalty. The words "reduced by an anticipation premium" did not clearly disclose this fact. Therefore, I find that SILA's prior statements did not disclose clearly the method of computing the unearned portion of the finance charge in the event of prepayment and did not comply with Section 226.6(a) of Regulation Z.

The language which was used by SILA did repeat the language of the Virginia statute governing Industrial Loan Associations[6] and SILA urges that it cannot be held liable for a violation of Regulation Z because of Section 226.8(b)(7) and a formal interpretation of that section by the Federal Reserve Board (RPF, p. 12).

SILA's argument is that Section 226.6(a) is general in its terms and is superseded by sections which are specifically applicable to particular disclosures. Such a section is 226.8(b)(7) which requires "[i]dentification of the method of computing any unearned portion of the finance charge in the event of prepayment in full of the [18] obligation." In its interpretation of this section (12 C.F.R. 226.818), the Board held that the methods of computing rebates are so complex that if they were repeated in a disclosure statement, they might detract from other disclosures. Therefore, the Board ruled that the requirement of Section 226.8(b)(7) is satisfied "simply by reference by name to the 'Rule of 78's' or other method."

Since its disclosure statement referred to an "other method"

[5] And the disclosure statements now used by SILA state:
Borrower shall have the right to anticipate (prepay) this loan. . . ." (Finding 23.)

[6] Any natural person borrowing from an industrial loan association shall have the right to anticipate payment of his debt at any time and shall receive a rebate for any unearned interest, which rebate shall be computed in accordance with the Standard Rule of 78 and shall be reduced by an anticipation premium equal to that portion of the contract interest allocable under such rule to the next six payments" (RX 2, §6.1-234).

authorized by a state statute and repeated its language, SILA argues that it has complied with Section 226.8(b)(7). That would seem to be correct; however, the complaint alleges a violation of Section 226.6(a) and I see nothing inconsistent in holding that respondent has not complied with this section even though it may have met the requirements of Section 226.8(b)(7).

This issue is not without difficulty for it is probable that respondent adopted the statutory language in the belief that it was complying with its obligation with respect to disclosure of prepayments rights. But respondent's good faith is not a defense if the language which it has adopted is unclear and potentially deceptive, as I believe it is. *FTC* v. *Algoma Lumber Co.*, 291 U.S. 67 (1934); *Koch* v. *FTC*, 206 F.2d 311 (6th Cir. 1953).

As I view the relationship between Sections 226.6(a) and 226.8(b)(7), satisfaction of the latter's requirements (as interpreted by the Board) does not mean that one has fully complied with the general rule that disclosures shall be clear and conspicuous. It is apparent that Section 226.8(b)(7) and the Board's interpretation are based on a predicate which does not exist here—that is, that the borrower is aware that his rebate is subject to reduction by a penalty. The Board recognizes that an actuarial explanation of the method of computing the rebate is so complex that it need not be revealed, but the Board has not authorized the use of language which conceals the fact that a penalty will be assessed if the loan is prepaid, since this disclosure involves no complex explanation and does not detract from other disclosures. Since the penalty is an integral part of the method which SILA uses in computing the unearned portion of its finance charge in the event of prepayment, SILA's failure clearly to disclose its existence violate Section 226.6(a) of Regulation Z. [19]

H. DISCONTINUANCE

As of March 14, 1974, SILA changed its disclosure statements in two respects. The terms "finance charge" and "annual percentage rate" are now more conspicuous than all other terminology (Finding 21) and the fact that there is a penalty in the event of prepayment of the loan is disclosed, although there may still be some confusion caused by retention of the words "anticipation" and "premium" (Finding 23).

SILA's discontinuance of two of the practices challenged in the complaint occurred before its issuance but after respondent was aware of the Commission's investigation of the adequacy of its disclosure statements. Discontinuance under these circumstances gives no assurance that the practices will not be resumed and an

appropriate cease and desist order should enter. See *e.g., Zale Corp.*, 78 F.T.C. 1233, 1240 (1971); *Spencer Gifts, Inc.* v. *FTC*, 302 F.2d 267 (3d Cir. 1962); *Coro, Inc.* v. *FTC*, 338 F.2d 149, 153 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965).

I. ORDER

SILA has violated several sections of Regulation Z and this calls for, at the minimum, an order prohibiting repetition of these or similar violations. However, complaint counsel propose an order which would not be so limited but would, in addition, require SILA to cease and desist from:

> Failing, in any consumer credit transaction or advertisement, to make all disclosures, determined in accordance with Sections 226.4 and 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.8, 226.9 and 226.10 of Regulation Z. (CPF, p. 26.)

All of the requirements of Regulation Z are in furtherance of the central purpose of the Truth in Lending Act, which is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit" (Truth in Lending Act, 15 U.S.C. 1601). Where there is such a close relationship between [20] various sections of a statute or its implementing regulations, it has been held that the Commission may prohibit not only those practices which were found to be illegal but also future violation of related statutory or regulatory mandates. *FTC* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 391–93 (1959).

On the other hand, while the Commission's discretion to outlaw related future violations is broad, its power is not unlimited where the violations are not flagrant or where they occur in an uncertain area of the law. *Grand Union Co.* v. *FTC*, 300 F.2d 92, 100 (2d Cir. 1962). See also *Swanee Paper Corp.* v. *FTC*, 291 F.2d 833 (2d Cir. 1961), *cert. denied*, 368 U.S. 987 (1962).

Nevertheless, the Commission issued a broad order under similar circumstances in *Virginia Mortgage Exchange, supra*, and no less is called for here. Since respondent has used disclosure statements in all loan transactions covered by Regulation Z, I see no need for an order provision requiring it to post signs on its premises which disclose to consumers their right to receive such statements.

J. SUMMARY

1. The Commission has jurisdiction over the subject matter of this proceeding and over the respondent.

2. Respondent has failed to include the broker's fee in the determination of the finance charge in its disclosure statements as required by Section 226.4(a)(3) of Regulation Z and has therefore violated the Truth in Lending Act and the Federal Trade Commission Act (15 U.S.C. 1602(q) and 1607(c)).

3. Respondent has failed to disclose the broker's fee as a prepaid finance charge in its disclosure statements as required by Sections 226.8(e)(1) and 226.8(d)(2) of Regulation Z and has therefore violated the Truth in Lending Act and the Federal Trade Commission Act (15 U.S.C. 1602(q) and 1607(c)).

4. Respondent has failed to itemize the components of the finance charge in its disclosure statements as required by Section 226.8(d)(3) of Regulation Z and has therefore [21] violated the Truth in Lending Act and the Federal Trade Commission Act (15 U.S.C. 1602(q) and 1607(c)).

5. Respondent has failed to disclose accurately the APR in its disclosure statements computed in accordance with Section 226.5(b), as required by Section 226.8(b)(2) of Regulation Z and has therefore violated the Truth in Lending Act and the Federal Trade Commission Act (15 U.S.C. 1602(q) and 1607(e)).

6. Respondent has failed to print the terms "finance charge" and "annual percentage rate" more conspicuously than other terminology in its disclosure statements as required by Section 226.6(a) of Regulation Z and has therefore violated the Truth in Lending Act and the Federal Trade Commission Act (15 U.S.C. 1602(q) and 1607(c)).

7. Respondent has failed to disclose clearly in its disclosure statements the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation as required by Section 226.6(a) of Regulation Z and has therefore violated the Truth in Lending Act and the Federal Trade Commission Act (15 U.S.C. 1602(q) and 1607(c)).

8. Respondent has failed to identify the broker as a creditor in its disclosure statements as required by Section 226.6(d) of Regulation Z and has therefore violated the Truth in Lending Act and the Federal Trade Commission Act (15 U.S.C. 1602(q) and 1607(c)).

Therefore, the following order should be, and is, entered:

ORDER

It is ordered, That respondent Security Industrial Loan Association, a corporation, its successors and assigns and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in

connection with any [22] extension of consumer credit or advertisement to aid, promote or assist, directly or indirectly, any extension of consumer credit as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. 226) of the Truth in Lending Act (Pub. Law 90-321, 15 U.S.C. 1601, *et seq.),* do forthwith cease and desist from:

1. Failing to include the broker's fee or finder's fee in the determination of the finance charge, as required by Section 226.4(a)(3) of Regulation Z.

2. Failing to disclose the broker's fee or finder's fee as a prepaid finance charge, as required by Section 226.8(e)(1) of Regulation Z, using the term "prepaid finance charge," as required by Section 226.8(d)(2) of Regulation Z.

3. Failing to itemize the components of the finance charge, as required by Section 226.8(d)(3) of Regulation Z.

4. Failing to disclose accurately the annual percentage rate computed in accordance with Section 226.5(b) of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z. [23]

5. Failing to print the terms "finance charge" and "annual percentage rate" more conspicuously than other terminology, as required by Section 226.6(a) of Regulation Z.

6. Failing to disclose clearly the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation, as required by Section 226.6(a) of Regulation Z.

7. Failing to identify the broker as a creditor, as "creditor" is defined in Section 226.2(m) of Regulation Z, as required by Section 226.6(d) of Regulation Z.

8. Failing, in any consumer credit transaction or advertisement, to make all disclosures, determined in accordance with Sections 226.4 and 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.8, 226.9 and 226.10 of Regulation Z.

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed [24] change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of any successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondent deliver a copy of this order to cease and desist to all present and future personnel of respondent engaged in the extension of consumer credit, and that respondent

secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That respondent shall, within sixty (60) days after the effective date of the order served upon it, file with the Commission a report in writing, signed by respondent, setting forth in detail the manner and form of its compliance with the order to cease and desist.

OPINION OF THE COMMISSION

BY DOLE, *Commissioner*

The chief issue in this case is whether a lender has violated the Truth in Lending Act by failing to include the broker's fee in the determination of the finance charge disclosed to the borrower in consumer credit transactions.

The complaint was issued on January 28, 1975, charging respondent Security Industrial Loan Association[1] with violations of the Truth in Lending Act[2], Regulation Z[3] promulgated thereunder, and the Federal Trade Commission Act[4] by failing to provide certain information in consumer credit cost disclosure statements given to customers. The complaint alleged that SILA committed these violations by failing: to include the broker's fee in the determination [2] of the finance charge; to disclose the broker's fee as a prepaid finance charge; to itemize the components of the finance charge; to disclose accurately the annual percentage rate; to print the terms "finance charge" and "annual percentage rate" more conspicuously than other terminology; to disclose clearly the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation; and to identify the broker as a creditor.

At the conclusion of the hearing, Administrative Law Judge Lewis F. Parker sustained each of the charges of the complaint. He ordered SILA to cease and desist from engaging in the violations charged.

This case is before us on respondent's appeal from the Initial Decision.

BACKGROUND

The facts of this matter, as set forth in the Initial Decision,[5] are not

[1] Hereinafter "SILA."

[2] 15 U.S.C. 1601, *et. seq.*

[3] 12 C.F.R. 226, *et. seq.*

[4] 15 U.S.C. 41, *et. seq.*

[5] The following abbreviations are used in this opinion: I.D. — Initial Decision (Finding No.); I.D. p. — Initial Decision (Page No.); CX — Commission Exhibit; RX — Respondent's Exhibit; RB — Respondent's Appeal Brief; CAB — Complaint Counsel's Answering Brief; RRB — Respondent's Reply Brief; Tr. — Transcript of Testimony; TROA — Transcript of Oral Argument before Commission; ALJ — Administrative Law Judge.

in substantial dispute.[6] They will be summarized below.

SILA is a corporation engaged in first and second mortgage financing of residential properties, making loans to homeowners within Virginia primarily for debt consolidation. Finance charges are imposed on these transactions.[7]

Homeowners desiring loans from SILA either apply directly, are referred to SILA by small loan companies or savings and loan associations, or utilize the services of mortgage brokers who submit applications on their behalf. The fees charged by brokers are not established by statute; they often range between 9 and 10 percent of the loan proceeds,[8] but are not uniform [3] and are subject to negotiation between broker and borrower.[9] In some instances, the broker's fee is renegotiated just prior to the closing of the loan,[10] but this occurs infrequently.[11]

In a typical transaction involving a broker, SILA receives from the broker a loan application executed by the client, along with a package of materials relevant to the application and a covering letter listing the enclosures. SILA furnishes to brokers forms for the covering letters and rate books which can be used to compute the brokerage fee.[12]

When SILA approves a loan, it informs the broker, if one is involved, of the terms and conditions of the loan and the name of the attorney who will close the loan. SILA's general counsel acts as the closing attorney if the closing is to be held in Richmond, where both SILA and its general counsel are located. If the closing is to be held outside of Richmond, the general counsel selects a local closing attorney and forwards the loan papers to him. These are sent under cover of a "forwarding sheet" providing general instructions to the closing attorney and, on occasion, special instructions, such as directions to pay specified bills of the borrower out of the loan proceeds.[13] Copies of SILA's Truth in Lending disclosure statements are included in the loan papers sent to the closing attorneys.[14]

Prior to implementation of the Truth in Lending Act, SILA directed loan brokers not to send their fee agreements to it. In letters to its closing attorneys, SILA advised that it would not authorize them to pay any broker's fee, but that written directions signed by

[6] RB 2.
[7] I.D. 1–2.
[8] Tr. 91–92, 95–96, 189; CX 51–83.
[9] I.D. 4–5.
[10] Tr. 89, 107, 154.
[11] Tr. 93, 115, 154.
[12] I.D. 6–7.
[13] I.D. 8.
[14] Tr. 32, 219.

the borrower to withhold a given sum from the loan proceeds should be honored.[15] The record [4] reflects that brokers do not provide copies of their fee agreements directly to SILA.[16] However, copies of the broker's fee agreements are usually sent to the closing attorneys, whether SILA's general counsel or local counsel, since it is general practice for the closing attorney to pay that fee out of the proceeds of the loan.[17] Some brokers also provided copies of their Truth in Lending disclosure statements to closing attorneys, whereas others did not.[18]

After receiving the loan papers, the closing attorney conducts a title search on the property securing the loan and arranges a convenient time for settlement with the borrower. At settlement, the closing attorney explains SILA's disclosure statement, the loan documents, and the terms of the loan. He gives the borrower a copy of SILA's disclosure statement, notice of the right to rescind, and a form of election not to rescind which is to be returned by the borrower after the three-day rescission period. The attorney has the borrower execute the deed of trust and endorse SILA's check. The attorney deposits the endorsed check in an escrow account pending expiration of the rescission period.[19] If the broker has furnished his disclosure statement to the closing attorney, it is given to the borrower by the attorney.[20]

Upon expiration of the rescission period and receipt of a signed statement from the borrower that he has elected not to rescind, the closing attorney disburses the loan proceeds from the escrow account in accordance with SILA's instructions. These generally require the attorney to make specified payments to the borrower's creditors, with the borrower's consent, and to pay the balance to the borrower. If the closing attorney has been furnished with the broker's agreement and the borrower has verified it, he will draw a check on the escrow account to the order of the broker for the amount specified.[21]

[5] After the closing, the attorney transmits to SILA the executed note, recorded deed of trust, the signed disclosure statement, rescission notice and election not to rescind, and a title policy if required. Of the four closing attorneys who testified at the hearing, three stated that they did not send to SILA any statement showing how the proceeds of the loan were disbursed. The fourth stated that

[15] I.D. 16; RX 3, 4.
[16] I.D. 9.
[17] I.D. 10.
[18] Tr. 193–194, 206; 104.
[19] I.D. 11–12.
[20] Tr. 79, 185, 194, 197, 206.
[21] I.D. 13–14; Tr. 114, 169, 211, 242–243.

he did send such statements to SILA; these statements show payments to brokers of the fee.[22]

SILA's disclosure statements do not list the broker as a creditor, do not list the broker's fee as a prepaid finance charge, do not include the fee as a component of the finance charge, and do not include the fee as a component in computing the annual percentage rate.[23]

I. Failure to Disclose Broker's Fee and to Identify Broker

Respondent SILA does not dispute the finding[24] that it has failed to incorporate the broker's fee and to identify the broker in its disclosure statements, but argues that it is not obligated to do so by the Truth in Lending Act and Regulation Z.

The purpose of the Truth in Lending Act is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uniformed use of credit."[25] Regulation Z, promulgated by the Board of Governors of the Federal Reserve System pursuant to the Act, requires as a general rule that any creditor extending credit other than open end make the disclosures required by the regulation for any transaction consummated on or [6] after July 1, 1969; generally, the disclosures must be made before the transaction is consummated.[26]

SILA regularly extends consumer credit in the ordinary course of business, and is therefore a creditor under Regulation Z.[27] Brokers who obtain loans for their clients from SILA are arrangers for the extension of consumer credit who receive a fee for their service; accordingly, they are also creditors under Regulation Z.[28] The broker's fee is a [7] finance charge within the meaning of Section 226.4(a)(3)of Regulation Z.[29]

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[22] I.D. 15.

[23] I.D. 17.

[24] *Id.*

[25] Truth in Lending Act, §102.

[26] Section 226.8(a):

General rule. Any creditor when extending credit other than open end credit shall, in accordance with §226.6 and to the extent applicable, make the disclosures required by this section with respect to any transaction consummated on or after July 1, 1969. Except as otherwise provided in this section, such disclosures shall be made before the transaction is consummated.

[27] Section 226.2(m):

Creditor means a person who in the ordinary course of business regularly extends or arranges for the extension of consumer credit. . . .

[28] Section 226.2(f):

"Arrange for the extension of credit" means to provide or offer to provide consumer credit which is or will be extended by another person under a business or other relationship pursuant to which the person arranging such credit receives or will receive a fee, compensation, or other consideration for such service. . . .

Regulation Z was amended effective October 28, 1975. Several provisions at issue in this proceeding were redesignated, such as Section 226.2(f), which is now Section 226.2(h). Since the amendment was effective after the complaint issued, all references are to Regulation Z as it existed when the complaint issued.

[29] Section 226.4(a)(3):

(Continued)

Since both SILA and the broker are creditors in brokered transactions, the provisions of Section 226.6(d) of Regulation Z dealing with multiple creditors apply and are at the heart of this matter. Section 226.6(d) provides:

> If there is more than one creditor in a transaction, each creditor shall be clearly identified and shall be responsible for making only those disclosures required by this part which are within his knowledge and the purview of his relationship with the customer. If two or more creditors make a joint disclosure, each creditor shall be clearly identified. . . .

Under Section 226.6(d), if both SILA and the broker join in making a single disclosure, the broker's fee must be reflected as a finance charge on the disclosure statement. Where, as here, separate disclosures are made, the broker's fee must be incorporated into the lender's disclosure statement only if it is within SILA's knowledge and the purview of its relationship to the customer.

Respondent argues that no satisfactory showing was made that it had knowledge of the broker's fee in any transaction when it prepared its disclosure statement, when it was forwarded for review to its general counsel, when all loan documents were forwarded by the general counsel to the closing attorney, when the disclosure statement was delivered to the borrower, or when the loan transaction was consummated.[30] [8] We agree with respondent that the record does not establish that brokers have provided copies of their fee agreements directly to SILA before consummation of the loan transaction.[31]

However, it was established that SILA's closing attorneys, whether the general counsel or local counsel, are usually sent a copy of the broker's fee agreement by the broker, since as a matter of general practice the closing attorney pays that fee out of the loan proceeds. Every closing attorney testifying at the hearing stated that he normally received the broker's fee agreement almost simultaneously with receipt of notice of the loan from SILA.[32] The fact that the broker's fee agreements were sent to the closing attorneys prior to

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> [T]he amount of the finance charge in connection with any transaction shall be determined as the sum of all charges, payable directly or indirectly by the customer, and imposed directly or indirectly by the creditor as an incident to or as a condition of the extension of credit, whether paid or payable by the customer, the seller, or any other person on behalf of the customer to the creditor or to a third party, including any of the following types of charges: . . . Loan fee, points, finder's fee, or similar charge.

[30] RB 9–10.

[31] I.D. 9. One broker testified that it was his policy to send his fee agreements to SILA, Tr. 83, but he did not know whether this policy was in fact carried out by his employees. Tr. 86–91. A former general counsel of SILA recalled seeing some brokers' agreements in closed files in his office, but could recall no instance in which such agreements were received from SILA. Tr. 131–132. These agreements could have been received from brokers or closing attorneys, before or after the loan transaction was consummated.

[32] Tr. 103 (Cutler); 148–149, 154, 156 (Lawrence); 206 (Brooks); 221, 226 (Dobbins).

the closing of the loan was corroborated by the testimony of the brokers.[33] There was also testimony indicating that the broker's disclosure statement, setting forth the brokerage fee, was often given to the borrower by the closing attorney.[34]

It is clear that the closing attorneys normally had knowledge of the amount of the broker's fee prior to closing the loan. Complaint counsel assert that since the closing attorney is SILA's agent, is given the responsibility to close the loan, and receives knowledge of the broker's fee as part of the closing transaction, this knowledge is imputable to SILA.[35] The general rule is that the knowledge of an agent acquired [9] while acting within the scope of his authority and in reference to a matter over which his authority extends must be imputed to the principal. *Armstrong* v. *Ashley,* 204 U.S. 272, 283 (1907); *see generally* 3 Am. Jur. 2d Agency §273 (1962); 4 ALR 3d 224 (1965). The ALJ rejected complaint counsel's argument that SILA is chargeable with the closing attorney's knowledge of the amount of the fee. He ruled that because SILA informed its closing attorneys (before the Truth in Lending Act was implemented) that it would not authorize them to pay brokers' fees and subsequently payment of those fees has been made at the direction of the borrower, not SILA, payment of the fee by the closing attorney is not within the scope of his express authority from SILA and his knowledge of the exact amount of the fee is not chargeable to SILA.[36]

In our opinion, the ALJ took an unduly narrow view of the agency relationship between SILA and its closing attorney. We find that receipt by the closing attorney of the broker's fee agreement was within the scope of his employment to close the loan. Conduct is within the scope of employment if it is "of the same general nature as that authorized, or incidental to the conduct authorized." Restatement (Second) of Agency §229 (1957). An agent's knowledge is to be imputed to a principal in a particular transaction if "the agent at some time had some duties to perform on behalf of the principal with respect to the transaction, although the agent need not have acquired his knowledge in connection with those duties." *Dawn Donut Company* v. *Hart's Food Stores, Inc.,* 267 F.2d 358, 363 (2d Cir. 1959). Despite SILA's letters to its closing attorneys advising that it would not authorize them to pay any broker's fee, the closing attorneys have, as a general practice, paid that fee out of the proceeds in

[33] Tr. 84–86 (Levinson), 187 (Hansen).

[34] Tr. 79, 194, 197, 206.

[35] CAB 6–7.

[36] I.D. p. 12. Although he determined that the closing attorneys' knowledge of the broker's fee is not imputable to SILA, the ALJ held that "the amount of the broker's fee, since it can be easily discovered by SILA's attorneys, should be disclosed in its Truth in Lending statements." I.D. p. 12. With respect to this holding, see *n.* 38 *infra.*

accordance with SILA's further statement in the letters that the borrower's directions to withhold a given sum from the loan proceeds should be honored. Even though the closing attorney may have been acting for the borrower in disbursing the broker's fee to the broker, this disbursement was of the same general nature as the disbursement authorized by SILA to creditors of the borrower, was incidential to the conduct authorized, and was part of the transaction of closing the loan. In paying the broker's fee, the closing attorney was acting as a dual agent, [10] and his knowledge was to be imputed to SILA despite the fact that he may have been acting for the borrower at the same time.[37] Therefore, we hold that the knowledge requirement of Section 226.6(d) of Regulation Z was met.[38]

Having concluded that the brokerage fee was within SILA's knowledge, we must next determine whether it was within the purview of SILA's relationship with the customer. Respondent contends that since the lender is not privy to the negotiations between the broker and his client, and the brokerage agreement is executed prior to any communications between the borrower [11] and the lender, the fee is outside the purview of SILA's relationship with the customer.[39]

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[37] "In actions by a third party against one of two principals who had been represented by an attorney in a dual capacity, it has frequently been held that the knowledge of the attorney would be imputed to the defendant-principal, notwithstanding the fact that the attorney may have been acting for the other principal at the same time." 4 ALR 3d 224, 245 (1965).

[38] Complaint counsel made the alternative argument that, under the circumstances, SILA's knowledge that a broker is involved and that a fee is being charged in a particular transaction is enough to satisfy the knowledge requirement of Section 226.6(d), and that it is then SILA's duty to find out what the amount of the broker's fee is. TROA 35–37. Complaint counsel based this argument upon SILA's continuing, established relationship with loan brokers, (CX 214, Respondent's Answer to Request for Admissions Par. 24), its issuance to them of loan application forms and rate books, and its knowledge that brokers receive a fee for their services. CAB 8–10. The fact that SILA knows that a particular broker is involved, by receipt of the loan application from the broker, does obviously require SILA to disclose the identity of the broker in its disclosure statement in accordance with Section 226.6(d) if the purview requirement is met, as discussed below. Given our holding regarding the agency relationship between SILA and the closing attorneys, we need not reach the question of whether SILA's knowledge that a broker's fee is involved in a particular loan is enough to meet the knowledge requirement of Section 226.6(d) as to the amount of the fee. We do note, however, that where the lender knows that a broker's fee is being charged in a loan transaction, and the amount of the fee tends to fall within a narrow range, as here (9-10 percent of the loan proceeds), a strong argument could be made that the broker's fee is within the lender's knowledge for purposes of Section 226.6(d), and that the lender must make a reasonable effort to ascertain the precise amount, pursuant to Section 226.6(f). *See* n. 55 *infra*. There may well be other circumstances where the relationship between lender and broker imposes the same duty on the lender. It appears that SILA and its attorneys are easily able to find out the amount of the broker's fee. Tr. 49, I.D. p. 12. *See* Landers, Determining the Finance Charge Under the Truth in Lending Act, 1977 A.B.F. Res. J. 45, 64-65 (1977).

[39] RB 12–14.

We cannot accept this argument. The purview requirement was addressed by us in *Virginia Mortgage Exchange*, 87 F.T.C. 182 (1976), where the issue was whether a broker must disclose the name of the lender and the formula for computing the unearned finance charge in the event of prepayment of a loan. In ruling that the broker must make these disclosures, we stated: "In our view, all terms of a given loan fall within the 'purview' or 'scope' of the relationship between a customer and the broker who arranges the loan." 87 F.T.C. at 198. We observed that this construction of Section 226.6(d) best comports with the manifest purpose of the Truth in Lending Act, which is to ensure full disclosure of credit terms in situations involving brokered loans as well as those negotiated by a borrower directly with a lender.

Likewise, we believe that all terms of a given loan and all charges incidental to it fall within the purview of the lender's relationship with the customer. The broker's fee represents a substantial cost to the borrower in obtaining a loan, and should be disclosed by the lender in its disclosure of the cost of credit when the knowledge requirement is met, as it is here. This is not a situation where there are two separate lenders, such as one providing a first mortgage and the other a second mortgage; it was that kind of situation for which the purview requirement was designed, relieving one lender from disclosing the second lender's terms where the latter's extension of credit is not within the purview of the relationship of the first lender with his customer.[40] [12]

We believe that SILA's failure to include the broker's fee in its disclosure statements has frustrated the Truth in Lending Act's basic purpose of enabling consumers to comparison shop for credit among the credit terms available from different sources and thereby avoid the uniformed use of credit through full disclosure. This is graphically illustrated by Commission Exhibit 217. The exhibit reflects what the annual percentage rate would be on eighteen of SILA's disclosure statements if the broker's fee had been included in the finance charge

[40] *Virginia Mortgage Exchange*, 87 F.T.C. at 201 n. 4.

Our construction of Section 226.6(d) is consistent with the pertinent Federal Reserve Board opinion letter. That letter states:

> [W]ith respect to the lender's disclosure statement, the loan brokerage fee would need to be disclosed only if it is within the lender's knowledge and the purview of his relationship with the customer, as prescribed by §226.6(d). The lender obviously cannot disclose the fee if he is not aware of it. On the other hand, should the loan brokerage fee be paid directly by the lender to the loan broker (for example, if the fee is withheld from the loan's proceeds and is paid to the broker), the fee would be within the lender's knowledge and it should be disclosed on the lender's disclosure statement. Federal Reserve Board Letter No. 699, CCH Consumers Credit Guide ¶30,996 (Special July 19, 1973).

As in the example cited by the opinion letter, in the instant matter the broker's fee is withheld from the loan's proceeds and is paid to the broker by the lender's closing attorney. Federal Reserve Board staff letters are to be accorded great deference. *Virginia Mortgage Exchange*, 87 F.T.C. at 200; *Philbeck* v. *Timmers Chevrolet, Inc.*, 499 F.2d 971, 976–977 (5th Cir. 1974).

and annual percentage rate. In one example discussed by complaint counsel,[41] SILA disclosed to Mr. and Mrs. Boone that the annual percentage rate of their loan was 12.50 percent. The Boones were apprised by the broker that his fee would be $500.00. If they decided to shop for credit, contacted a lender directly, and were informed that he would provide credit at a 15 percent annual percentage rate for a loan involving no broker, would they be able to meaningfully use those figures? Only if they were unusually dedicated and fastidious comparison shoppers would they be likely to ascertain that the annual percentage rate for the SILA loan, with the broker's fee included, was 19 percent. [13]

We hold that respondent's failure to include the broker's fee in the determination of the finance charge in its disclosure statements violated Sections 226.4(a) and 226.6(d) of Regulation Z since the fee was a component of the total finance charge and was within SILA's knowledge and the purview of its relationship with the customer. Respondent therefore violated the Truth in Lending Act and, pursuant to Section 108(c) of that Act, 15 U.S.C. 1607(c)(1970), engaged in an unfair or deceptive act or practice under Section 5 of the Federal Trade Commission Act.[42]

Since the broker's fee is within the knowledge of SILA and the purview of its relationship with its customers and respondent has failed to disclose it, respondent has violated the Truth in Lending Act and Federal Trade Commission Act by failing to disclose the broker's fee in its disclosure statements as a prepaid finance charge, pursuant to Sections 226.8(e)(1) and 226.8(d)(2) of Regulation Z;[43] failing to itemize the components of the finance charge in its disclosure statements as required by Section 226.8(d)(3) of Regulation Z;[44] failing to disclose [14] accurately the annual percentage rate in its

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[41] CAB 14.

[42] Our holding here could have the result of consumers being furnished with similar statements by both broker and lender. *Cf. Virginia Mortgage Exchange*, 87 F.T.C. at 201. We continue to believe that the option presented by Section 226.6(d) of all creditors in a transaction providing a single joint disclosure statement, listing the names of each creditor and all necessary credit terms, has great benefits with respect to clarity and economy. If multiple creditors do not choose to make a joint disclosure, furnishing similar separate disclosures is far preferable to furnishing separate disclosures with random omissions.

[43] Section 226.8(e)(1) requires the disclosure of

> Any finance charge paid separately, in cash or otherwise, directly or indirectly to the creditor or with the creditor's knowledge to another person, or withheld by the creditor from the proceeds of the credit extended.

According to Section 226.8(d)(2), the charges must be disclosed as a "prepaid finance charge."

[44] Section 226.8(d)(3) requires the disclosure of

> . . .the total amount of the finance charge, with description of each amount included, using the term "finance charge."

disclosure statements computed in accordance with Section 226.5(b) of Regulation Z, as required by Section 226.8(b)(2);[45] and by failing to identify the broker as a creditor in its disclosure statements, as required by Section 226.6 (d) of Regulation Z.[46]

Several concerns raised by respondent with respect to incorporation of the broker's fee in its disclosure statement should be addressed here. The state statute relating to industrial loan associations under which SILA operates[47] sets forth a maximum rate of interest allowed to be charged by industrial loan associations. Respondent is concerned that if it were to include the broker's fee in computing the annual percentage rate, this would produce on the disclosure statement an annual percentage rate indicating a prima facie violation of the state statute.[48] Since SILA's disclosure statements which incorporate the broker's fee must itemize the components of the finance charge in accordance with Section 226.8(d)(3) of Regulation Z, it will be clear from the [15] face of the statements that the broker's fee is a component of the finance charge and entered into the calculation of the annual percentage rate.[49]

Respondent is also concerned that, by incorporating a broker's fee over which it has no control in its disclosure statement, it may be responsible for furnishing a false statement if the broker's fee reported to it is inaccurate.[50] One source of this concern is that the broker's fees are sometimes renegotiated just prior to closing the loan; this occasionally occurs when the loan granted by SILA is lower than that applied for, resulting in the broker receiving a lower fee than originally agreed upon with the borrower.[51] However, the record indicates that this occurs only in a small minority of instances,[52] and

[45] Section 226.8(b)(2) requires disclosure of ". . .the finance charge expressed as an annual percentage rate, using the term 'annual percentage rate,' " with exceptions not applicable here.

Section 226.5(b) requires disclosure of the annual percentage rate with an accuracy at least to the nearest quarter of 1 percent.

[46] Section 226.6(d) provides that when the knowledge and purview requirements are met, "if there is more than one creditor in a transaction, each creditor shall be clearly identified." The broker's name is known to SILA, both directly upon receipt from the broker of a loan application executed by the client, and as imputed from the closing attorney. For the reasons discussed above with respect to the broker's fee, the name of the broker is within the purview of the relationship between lender and borrower.

[47] Industrial Loan Associations Act of the Commonwealth of Virginia. I.D. 2; RX 2.

[48] TROA 20–22.

[49] At the hearing, the acting Commissioner for Banking for Virginia testified that if SILA added the broker's fee in computing the annual percentage rate, it would indicate to his examiners a prima facie violation of the state statute. I.D. 19; Tr. 291–301; CX 217. However, if it were clear that SILA was including the broker's fee in determining the annual percentage rate for purposes of informing the borrower and was not actually imposing the fee as a condition for the loan, he stated that no action would be taken. Tr. 306.

[50] TROA 28–29. At the oral argument, respondent's counsel stated that it was because of this concern that SILA advised brokers, prior to implementation of the Truth in Lending Act, not to send their fee agreements to it. TROA 28.

[51] Tr. 89, 107, 154; TROA 28.

[52] Tr. 93, 115, 154.

when it does occur the closing attorney has knowledge of the adjusted amount prior to the closing of the loan.[53] This is generally necessary for the closing attorney to make the distribution of the loan proceeds. Respondent is further concerned that since the broker's fee is outside SILA's control, it has no way of validating the accuracy of the information as to the total fee charged by the broker.[54] Because the closing attorney generally receives a copy of the broker's fee agreement, has knowledge of the final brokerage fee before closing the loan, and makes the disbursement to the broker [16] based upon that information, we think it unlikely that the amount known to him would be inaccurate. If, however, the brokerage fee reported to SILA or the closing attorney is inaccurate, SILA would not be responsible for any false disclosure in the absence of knowledge of such inaccuracy (*e.g.*, a computational error made by a broker that is not obvious on the face of the brokerage agreement). Lack of knowledge of the correct fee would be as complete a defense under Section 226.6(d) as lack of knowledge that any fee was charged. Similarly, SILA would not be liable if the inaccuracy were due to an adjustment of the fee by the broker after closing without the lender's knowledge, pursuant to Section 226.6(g) of Regulation Z.

Furthermore, where the precise amount of the total broker's fee is not known in a particular instance, or SILA is aware that the final fee may differ from the reported fee, SILA would not be liable under Section 226.6(f) of Regulation Z for any inaccurate disclosure as long as it made a reasonable effort to ascertain the amount and used an estimated amount which is (1) clearly identified as such, (2) reasonable, (3) based upon the best information available, and (4) not used for the purpose of circumventing the disclosure requirements of Regulation Z.[55]

II. Failure to Disclose Clearly the Method of Computing the Unearned Portion of the Finance Charge in the Event of Prepayment

SILA allows its customers to prepay their loan at any time and receive a rebate for any unearned interest. This rebate is reduced by a prepayment penalty. From July 1, 1969, through March 13, 1974, SILA's disclosure statements contained the following language regarding prepayment:

> Borrower shall have the right to anticipate payment of this debt

[53] Tr. 154, 226.
[54] TROA 28–29.
[55] 12 C.F.R. 226.6(f).

at any time and shall receive a rebate for any unearned interest, which rebate shall be computed in accordance with the Standard Rule of 78 and shall be reduced by an anticipation premium [17] equal to that portion of the contract interest allocable under such Rule to the next six payments.[56]

The complaint charged that SILA has failed to disclose clearly the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation, as required by Section 226.6(a) of Regulation Z. That section sets forth the general rule regarding disclosure requirements and is applicable to all other sections of Regulation Z. It provides:

> Section 226.6(a) *Disclosures; general rule.* The disclosures required to be given by this part shall be made clearly, conspicuously, in meaningful sequence, in accordance with the further requirements of this section, and at the time and in the terminology prescribed in applicable sections.

Respondent contends that it has not violated Section 226.6(a) because it has repeated the language of the Virginia statute governing industrial loan associations.[57] It claims that it has thereby complied with another section of Regulation Z, Section 226.8(b)(7), which requires "[i]dentification of the method of computing any unearned portion of the finance charge in the event of prepayment in full of the obligation." In interpreting this section, the Federal Reserve Board has stated that the methods of computing rebates under many state statutes are so complex that if they were repeated on a disclosure statement, they might detract from other important disclosures. Consequently, the Board ruled that the rebate identification requirement is satisfied by reference to the applicable statutory method.[58] It is respondent's view that [18] Section 226.8 (b)(7), as interpreted by the Board, is specifically applicable to a particular disclosure and supersedes the more general disclosure requirement of Section 226.6(a).

We agree with the ALJ that SILA has violated Section 226.6(a) by failing to disclose clearly that the borrower can prepay his debt and that the rebate he receives is reduced by a penalty. As the ALJ determined, the fact that SILA allows prepayment would have been

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[56] I.D. 22; CX 1–39.

[57] RX 2; RB 14.

[58] Section 226.818(c):

> Many State statutes provide for rebates of unearned finance charges under methods known as the "Rule of 78's" or "sum of the digits" or other methods. In view of the fact that such statutory provisions involve complex mathematical descriptions which generally cannot be condensed into simple accurate statements, and which if repeated at length on disclosure forms could detract from other important disclosures, the requirement of rebate "identification" is satisfied simply by reference by name to the "Rule of 78's" or other method, as applicable.

much clearer to the average consumer if instead of stating that the borrower can "anticipate payment," SILA had used language along the following lines: "Borrower shall have the right to prepay this loan. . . ." SILA's disclosure that the rebate would be "reduced by an anticipation premium" did not clearly reveal that the rebate was subject to a penalty.[59] The ALJ found that the meaning [19] of the language employed by respondent was unclear to consumers. Although there was no consumer testimony at the hearing, we conclude, based on our own review of respondent's forms, that the ALJ properly assessed the inadequacy of the language used by respondent. It is well established that the Commission may determine that the meaning of language is deceptive or unclear on the basis of its expertise. *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 386 (1965); *J. B. Williams Co.* v. *FTC*, 381 F.2d 884, 890 (6th Cir. 1967).

We reject SILA's argument that the general requirement of Section 226.6(a) of Regulation Z, mandating that all disclosures be made clearly, is somehow superseded by Section 226.8(b)(7) and the Board's Interpretation 226.818. This provision, as interpreted by the Board, merely deals with *identification* of the statutory method of computing the rebate of unearned finance charges. It in no way excuses compliance with the general rule that requisite disclosures, such as that the borrower's rebate for prepaying the debt is reduced by a penalty, be made clearly and conspicuously. As the ALJ aptly stated,

> It is apparent that Section 226.8(b)(7) and the Board's interpretation are based on a predicate which does not exist here—that is, that the borrower is aware that his rebate is subject to reduction by a penalty. The Board recognizes that an actuarial explanation of the method of computing the rebate is so complex that it need not be revealed, but the Board has not authorized the use of language which conceals the fact that a penalty will be assessed if the loan is prepaid, since this disclosure involves no complex explanation and does not detract from other disclosures. Since the penalty is an integral part of the method which SILA uses in computing the unearned portion of its finance charge in the event of prepayment, SILA's failure clearly to disclose its existence violates Section 226.6(a) of Regulation Z.[60]

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[59] SILA has made these disclosures somewhat clearer since March 14, 1974, when it began using the following language in its disclosure statements:

> Prepayment: Borrower shall have the right to anticipate (prepay) this loan at any time and shall receive a rebate of the unearned interest portion of the finance charge computed in accordance with the Standard Rule of 78 less an anticipation (prepayment) premium equal to that portion of the contract interest allocable under such Rule to the next six payments.

I.D. 23; RX 1; Tr. 55.

The ALJ stated that there still may be some confusion caused by retention of the words "anticipation" and "premium." I.D. p. 19. Although the disclosure would be clearer without the word "anticipation," the inclusion of the central notion of prepayment aids consumer understanding of this language. However, use of the word "premium" still renders the language employed by SILA unclear to consumers; a premium connotes, in common parlance, a "reward," Oxford English Dictionary 1281 (1971); Webster's Seventh New Collegiate Dictionary 617 (1969). The language would be made clearer if "penalty" were substituted for "premium."

[60] I.D. p. 18.

[20] We also reject respondent's further argument that the requirement of Section 226.6(a) that disclosures be made "clearly" and "conspicuously" only refers to the physical characteristics of the disclosure rather than its ability to communicate.[61] The general rule of Section 226.6(a) is intended to advance the fundamental purpose of the Truth in Lending Act — to promote the informed use of credit and to assure meaningful disclosure of credit terms.[62] To construe the general disclosure requirement of the Act's implementing regulation as only applicable to the graphic presentation of the requisite disclosures, rather than to their language and meaning, would seriously erode the regulation's effectiveness in carrying out the purpose of the Act.

We hold that by failing to disclose in clear, unambiguous language that borrowers may prepay their debt and that the rebate they will receive will be reduced by a penalty, SILA has violated Section 226.6(a) of Regulation Z, as charged.

III. Failure to Print The Terms "Finance Charge" and "Annual Percentage Rate" More Conspicuously Than Other Terminology

SILA's disclosure statements which were in use between July 1, 1969 and March 13, 1974 did not have the terms "finance charge" and "annual percentage rate" printed thereon more conspicuously than all other terminology.[63] Therefore, SILA has not complied with Section 226.6(a) of Regulation Z:

> Except with respect to the requirements of §226.10, where the terms "finance charge" and "annual percentage rate" are required to be used, they shall be printed more conspicuously than other terminology required by this Part. . . .

Even though SILA's violation of Section 226.6(a) here may have been technical or "minor,"[64] this does not excuse it from liability. *See Certified Building Products, Inc.*, 83 F.T.C. 1004, 1041 (1973), *aff'd sub nom. Thiret* v. *FTC*, 514 F.2d 176 (10th Cir. 1975). [21]

IV. Discontinuance

The ALJ found that since March 14, 1974, SILA has made two changes to its disclosure statements: the terms "finance charge" and

[61] RB 15.
[62] Truth in Lending Act, §102. *See Mourning* v. *Family Publication Service*, 411 U.S. 356, 377–378 (1973).
[63] I.D. 20; CX 1–39.
[64] RB 16.

"annual percentage rate" are now more conspicuous than other terminology,[65] and the fact that a penalty is imposed in the event of prepayment of the debt is now disclosed.[66]

We agree with ALJ that since discontinuance of these practices challenged in the complaint occurred after respondent was aware of the Commission's investigation, there is no assurance that these practices will not be resumed and an appropriate cease and desist order should enter.[67]

ORDER

The order issued by the ALJ prohibits SILA from engaging in the violations found to have occurred, with respect to the failure to make certain disclosures required by Section 226.6 of Regulation Z and the failure to make certain disclosures in the manner required by the regulation. The Commission has determined to adopt this order. The first provision of the order requires SILA to include the broker's fee in the determination of the finance charge. This provision is supported by our finding that SILA's closing attorneys normally had knowledge of the amount of the broker's fee prior to closing the loan, and our conclusion that the brokerage fee was within SILA's knowledge and the purview of its relationship with the customer. Order provisions 2, 3, and 4 prohibit violations stemming from SILA's failure to incorporate the broker's fee in the finance charge. If in the future SILA is of the opinion that it no longer has knowledge of the broker's fee through its closing attorneys, it may petition the Commission to reopen the proceeding for the purpose of altering, modifying, or setting aside these provisions due to changed conditions of fact pursuant to Section 3.72 of the Commission's Rules of Practice. However, as we discussed in note 38 *supra,* even if SILA can demonstrate that it no longer has constructive knowledge through its closing attorneys of the broker's fee, the circumstances of its relationships with brokers may still provide it with knowledge of their fees within the meaning of Section 226.6(d) of Regulation Z. [22]

Order provision 7 prohibits SILA from failing to identify the broker as a creditor. This provision is supported by our finding that in brokered transactions SILA has knowledge of the broker's identity by virtue of receipt of the loan application from the broker and our conclusion that, as to the broker's identity, the knowledge and purview requirements of Section 226.6(d) of Regulation Z are present.

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[65] I.D. 21.

[66] I.D. 23.

[67] *See, e.g., Fedders* v. *FTC,* 529 F.2d 1398 (2d Cir.), *cert. denied,* 45 U.S.L.W. 3244 (October 5, 1976); *Certified Building Products, supra.*

As with the order provisions discussed above, of course, SILA may petition the Commission to reopen on the basis of changed conditions relating to this provision.

Order provision 5 remedies a specific violation and needs no elaboration. Order provision 7 requires SILA to make a clear disclosure of the methods of computing any unearned portion of the finance charge in the event of prepayment of the obligation. The foundation for this provision is our holding that SILA has failed to disclose in clear, unambiguous language that borrowers may prepay their debt and that the rebate they will receive will be reduced by a penalty. As discussed in note 59 *supra,* continued use of the word "premium" which renders the prepayment disclosure language used by SILA unclear to consumers would violate provision 7 of the order, in the Commission's opinion.

Finally, the order requires SILA to cease and desist from:

> Failing, in any consumer credit transaction or advertisement, to make all disclosures, determined in accordance with Sections 226.4 and 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.8, 226.9 and 226.10 of Regulation Z.

This order provision is appropriate, for the disclosures required by the Truth in Lending Act and Regulation Z bear a close relationship and the Commission may prohibit not only those practices which were found to be illegal but also future violations of related statutory or regulatory mandates. *FTC* v. *Mandel Brothers, Inc.,* 359 U.S. 385, 391–393 (1959). As we stated in *Virginia Mortgage Exchange,* 87 F.T.C. at 202, in issuing a broad order under similar circumstances, it is [23] well established that the Commission "is not limited to prohibiting 'the illegal practice in the precise form' existing in the past. *FTC* v. *Ruberoid,* 343 U.S. 470, 473 (1952). This agency, like others, may fashion its relief to restrain 'other like or related unlawful acts.' *NLRB* v. *Express Pub. Co.,* 312 U.S. 426, 436 (1941)"; *FTC* v. *Mandel Brothers Inc.,* 359 U.S. at 392; *see also Jacob Siegel Co.* v. *FTC,* 327 U.S. 608, 611 (1946); *Fedders Corp.* v. *FTC,* 529 F.2d 1398 (2d Cir.), *cert. denied,* 45 U.S.L.W. 3244 (October 5, 1976).

The findings and conclusions of the administrative law judge are adopted as the findings and conclusions of the Commission, except to the extent that they are inconsistent with this opinion. An appropriate order is appended.

Final Order

This matter having been heard by the Commission upon the appeal of respondent from the initial decision; and

The Commission having considered the oral arguments of counsel, their briefs, and the whole record; and

The Commission, for reasons stated in the accompanying opinion, having denied in full the appeal of respondent's counsel; accordingly

It is ordered, That, except to the extent that it is inconsistent with the Commission's opinion, the initial decision of the administrative law judge be, and it hereby is, adopted together with the opinion accompanying this order as the Commission's final findings of fact and conclusions of law in this matter;

It is further ordered, That the following cease and desist order be, and it hereby is, entered: [2]

ORDER

It is ordered, That respondent Security Industrial Loan Association, a corporation, its successors and assigns and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension of consumer credit or advertisement to aid, promote or assist, directly or indirectly, any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. 226) of the Truth in Lending Act (Pub. Law 90-321; 15 U.S.C. 1601, *et seq.),* do forthwith cease and desist from:

1. Failing to include the broker's fee or finder's fee in the determination of the finance charge, as required by Section 226.4 (a)(3) of Regulation Z.

2. Failing to disclose the broker's fee or finder's fee as a prepaid finance charge, as required by Section 226.8(e)(1) of Regulation Z, using the term "prepaid finance charge," as required by Section 226.8(d)(2) of Regulation Z.

3. Failing to itemize the components of the finance charge, as required by Section 226.8(d) (3) of Regulation Z.

4. Failing to disclose accurately the annual percentage rate computed in accordance with Section 226.5(b) of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

5. Failing to print the terms "finance charge" and "annual percentage rate" more conspiciously than other terminology, as required by Section 226.6(a) of Regulation Z.

6. Failing to disclose clearly the methods of computing any unearned portion of the finance charge in the event of prepayment of the obligation, as required bySection 226.6(a) of Regulation Z. [3]

7. Failing to identify the broker as a creditor, as "creditor" is

defined in Section 226.2(m) of Regulation Z, as required by Section 226.6(d) of Regulation Z.

8. Failing, in any consumer credit transaction or advertisement, to make all disclosures, determined in accordance with Sections 226.4 and 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.8, 226.9 and 226.10 of Regulation Z.

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of any successor corporation, the creation or dissolution of subsidaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondent deliver a copy of this order to cease and desist to all present and future personnel of respondent engaged in the extension of consumer credit, and that respondent secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That respondent shall, within sixty (60) days after the effective date of the order served upon it, file with the Commission a report in writing, signed by respondent, setting forth in detail the manner and form of its compliance with the order to cease and desist.

IN THE MATTER OF

S. S. KRESGE COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2901. Complaint, Sept. 22, 1977 — Decision, Sept. 22, 1977

This consent order, among other things, requires a Troy, Mich. general merchandise retailer, to cease authorizing or instituting credit collection suits in counties other than where a defendant resides or signed the relevant contract. Further, where such suits have already been initiated, the firm is required to terminate them, vacate any rendered judgments, and give notice to concerned parties that such action has been taken.

Appearances

For the Commission: *Eddie W. Correia.*

For the respondent: *J. Wallace Adair, Howrey & Simon,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that certain acts and practices used by attorneys engaged by collection agencies with whom respondent S. S. Kresge placed retail credit accounts for collection violated Section 5 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the public interest, issues this complaint:

PARAGRAPH 1. S. S. Kresge Company is a Michigan corporation with its principal office located at 3100 West Big Beaver, Troy, Michigan.

PAR. 2. Respondent is a general merchandise retailer, engaged in the advertising, offering for sale, sale and distribution of clothing, household goods, appliances, tools and various other articles of merchandise.

PAR. 3. In the course and conduct of its business as aforesaid, respondent now causes the sale, ships and distributes its merchandise to purchasers located in various States of the United States. Therefore, respondent maintains a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. In the course and conduct of its business, respondent extended credit to holders of its credit card (herein referred to as retail credit accounts) for the purpose of facilitating consumers' purchases of respondent's merchandise.

PAR. 5. In the course of attempting to collect allegedly delinquent

retail credit accounts, respondent placed some such accounts with collection agencies or other parties for collection. If informal collection efforts were unsuccessful, the collection agency or other party in some instances initiated legal proceedings in the name of respondent. In some such proceedings, attorneys retained by collection agencies commenced suit in a court located in a county other than the county where the purchaser defendant resided or signed the underlying obligation. Although respondent may not have had knowledge of nor authorized this practice, it had not specifically required such parties to initiate the legal proceedings in counties where the defendant resided or signed the contract sued upon. Courts located in the counties where the defendants resided or signed the contracts sued upon were available for these suits. The distance, cost and inconvenience of defending such suits placed a burden on defendants and, thus, effectively deprived some defendants of the opportunity to appear, answer and defend.

PAR. 6. The above acts and practices were all to the prejudice and injury of the public and constituted unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Cleveland Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The Respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by the respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the

procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent S. S. Kresge Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business located at 3100 West Big Beaver, in the City of Troy, State of Michigan.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding, and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That proposed respondent, S. S. Kresge Company, a corporation, and its successors, assigns, officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the collection of retail credit accounts in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from authorizing the institution of or instituting retail credit collection suits other than in the county where the defendant resides at the commencement of the action, or in the county where the defendant signed the retail credit contract sued upon. Institution of suit in the county appearing from proposed respondent's business records to be defendant's last known address shall be compliance, unless proposed respondent otherwise knows of a more current address. This provision shall not preempt any rule of law which further limits choice of forum or which requires, in actions *quasi in rem* or involving real property or fixtures attached to real property, that suit be instituted in a particular county. The term "county" includes any equivalent political subdivision known by some other term.

II

It is further ordered, That as to any retail credit collection suit instituted in the name of proposed respondent by collection agencies or other parties subsequent to the date of this order, outside the county where the defendant resides or signed the contract sued upon and which is not required by rule of law to be instituted in some other county, such suit shall be terminated and any default judgment entered thereunder vacated forthwith after proposed respondent

learns of such suit or judgment. In all such cases, clear notice shall be provided to the defendants to these actions, to each "consumer reporting agency," as such term is defined in the Fair Credit Reporting Act (15 U.S.C. 603) which proposed respondent knows or has reason to know recorded the suit or judgment in its files, and to any other person or organization upon request of the defendant.

III

It is further ordered, That proposed respondent shall forthwith deliver a copy of this order to each of its subsidiaries and operating divisions dealing with consumer credit and to each agency with whom proposed respondent currently places its retail credit accounts for collection, and to any other agency prior to referral of proposed respondent's retail credit accounts for collection. Proposed respondent shall obtain and preserve for two (2) years after it terminates its business relationship with any agency with regard to the collection of retail credit accounts, a signed and dated statement from each agency acknowledging receipt of the order and willingness to comply with it.

IV

It is further ordered, That proposed respondent notify the Commission at least thirty days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or any other change in the corporation, including the creation or dissolution of subsidiaries, which may affect compliance obligations arising out of the order.

It is further ordered, That proposed respondent shall, within sixty (60) days and at the end of six (6) months after the effective date of the order served upon it, file with the Commission a report in writing, signed by proposed respondent setting forth in detail the manner and form of its compliance with this order.

IN THE MATTER OF

FLAGG INDUSTRIES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2903. Complaint, Sept. 27, 1977 — Decision, Sept. 27, 1977

This consent order, among other things, requires a Los Angeles, Calif. land sales company to cease misrepresenting the size and extent of their business and assets; the resale opportunities, potential profits and soundness of land investments; and the advent of industry and the availability of employment. Respondents are prohibited from using deceptive sales plans, and required to make affirmative disclosures, including risks involved in land purchase, and the buyers' rights to cancellation and refunds. Further, the provisions of the order require respondents to provide the three primary subdivisions, Cordes Lakes, Verde Village, and Valle Vista, with the improvements, amenities and facilities described in the HUD Property Reports, and for a period of five years, to properly distribute $20,000 into three separate trust funds, for use by the three respective property owners' associations.

Appearances

For the Commission: *Howard Manning, Jr.*

For the respondents: *W. Reece Bader, Orrick, Herrington, Rowley & Sutcliffe,* San Francisco, Calif.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Flagg Industries, Inc., a corporation, and Queen Creek Land and Cattle Company, a corporation, (hereinafter sometimes referred to as "respondents") have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Flagg Industries, Inc. (hereinafter sometimes referred to as "Flagg") is a corporation organized, existing and doing business under and by viture of the laws of the State of California, with its principal office and place of business located at 10960 Wilshire Boulevard, Los Angeles, California.

PAR. 2. Respondent Queen Creek Land and Cattle Company (hereinafter sometimes referred to as "Queen Creek") is a corporation organized, existing and doing buisness under and by virtue of the laws of the State of Arizona, with its principal office and place of

business located at 3500 North Central Ave., Financial Center, Phoenix, Arizona.

PAR. 3. Respondent Queen Creek Land and Cattle Company is and for some time past has been a wholly-owned subsidiary of respondent Flagg Industries, Inc. Respondent Flagg dominates or controls the acts and practices of its subsidiary corporation, Queen Creek, and is responsible for the acts and practices of its subsidiary as alleged herein.

PAR. 4. Respondent Queen Creek is now and for some time past has been engaged in the business of acquiring undeveloped land in Arizona, subdividing said land into lots, and advertising, offering for sale, and selling said lots to the public in the State of Arizona and in other states. The subdivisions in which lots have been and are being offered for sale by respondent are known as Valle Vista, Verde Village, and Cordes Lakes, each consisting of substantial acreage. Respondent's sales force is divided into regions consisting of the Western Region, which includes the States of Washington, California, Oregon, and Arizona; the Midwest Region, which includes the States of Illinois, Indiana, and other Midwestern States; and the Northwest Region, which includes the States of Colorado, Wyoming, Montana, the Dakotas and Nebraska. For each of the above-listed regions, respondent employs a regional sales manager whose primary function is to make sales to the residents of the respective states through salesmen residing in those states. Respondent employs direct soliciation as well as dinner meetings at which a sales presentation is made by the salesmen using slides, elaborately prepared brochures and other advertising material, and high pressure sales tactics.

PAR. 5. Respondent Queen Creek sells or has sold lots to purchasers by use of standard form contracts, entitled "Purchase and Sale Agreement" (hereinafter sometimes referred to as a "contract") whereby the purchaser obligates himself to pay monthly installments over a period ranging from 5 to 7 years' duration. In return for the purchaser's promise to pay and subsequent payment, respondent holds a purchase money note and executes a warranty deed in favor of the purchasers.

PAR. 6. In the course and conduct of its business as aforesaid, respondent Queen Creek has for some time past caused its advertisements, promotional material, contracts and various business papers to be transmitted through the U.S. mail and other interstate instrumentalities from its various places of business to agents, representatives, employees, customers, and prosepctive customers in various other States of the United States. Respondent's volume of business is substantial and its acts and practices, as hereinafter set

forth, are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 7. In the further course and conduct of the aforesaid business, respondent Queen Creek has made various statements and representations, directly or by implication, concerning the size, diversity, and assets of respondent Flagg, the backing of respondent's land sales business by such assets, and the good reputation and integrity of Flagg.

PAR. 8. In truth and in fact, respondent Flagg's assets, prestige and diversity of holdings, beyond the guarantee of certain loans or making some cash payments, were not committed to its subsidiary's completion of the subdivisions through expenditures for promised improvements and amenities. Therefore, the acts and practices alleged in Paragraph Seven are deceptive and unfair.

PAR. 9. In the further course and conduct of its aforesaid business, respondent Queen Creek has made various statements and representations concerning the supply and demand for land; the liquidity or marketability of land; land prices and values; land as an investment; personal financial security; the stock market; banks and insurance; population growth and movement; the size and diversity of respondent's assets; and various options or financial protections afforded purchasers of respondent's land, including but not limited to purchasers' rights to cancel the contract within six months, should they visit the property. By and through such statements and representations and others not set forth herein, respondent has represented directly or by implication that lots which respondent is offering for sale are an excellent investment for the price at which respondent is offering them for sale, that significant monetary gain can be achieved by purchasing such lots, and that there is little or no financial risk involved in the purchase of said lots at said prices.

PAR. 10. In truth and in fact, in a significant number of instances, lots which respondent has offered and is offering for sale, at the prices at which respondent has offered and is offering them for sale, have been and are poor investments involving a substantial amount of risk to purchasers. Therefore, the acts and practices alleged in Paragraph Nine are deceptive and unfair.

PAR. 11. In the further course and conduct of its aforesaid business, respondent Queen Creek has offered for sale lots in its subdivisions without disclosing to prospective purchasers that the lots being offered are, at the price respondent is offering them, a risky investment in that, *inter alia,* the future value of lots being offered is uncertain and the purchasers probably will be unable to sell their lots, or their interests in them under the contract, at or above the

purchase price. Respondent has therefore failed to disclose material facts which, if known to prospective purchasers, would be likely to affect their consideration of whether or not to purchase a lot from respondent. The failure to disclose such information is a deceptive and unfair act or practice.

PAR. 12. In the further course and conduct of its aforesaid business, respondent Queen Creek, through statements in advertisements, booklets, pamphlets, letters, slides, and oral presentations has represented directly, or by implication, that the resale of a lot purchased from respondent is not difficult.

PAR. 13. In truth and in fact, there is virtually no resale market for lots purchased at respondent's subdivisions. Therefore, the representations, acts, or practices alleged in Paragraph Twelve are deceptive and unfair.

PAR. 14. In the further course and conduct of the aforesaid business, respondent Queen Creek, through oral statements and periodic increases in prices of lots, has represented, directly or by implication, that the market value of the lots at its subdivisions is rising.

PAR. 15. In truth and in fact, the market value of the land has not been rising. Therefore, the acts and practices alleged in Paragraph Fourteen herein are deceptive and unfair.

PAR. 16. In the further course and conduct of its aforesaid business, respondent Queen Creek has made various oral and written statements and representations to prospective purchasers, including purchasers under contract with respondent, by which respondent has represented and is representing, directly or by implication, that the value of lots has increased significantly, or will increase in value, and that purchase of said lots is a way of achieving financial security.

PAR. 17. In truth and in fact, the value of lots has not increased significantly since the purchase from respondent. Therefore, the acts and practices alleged in Paragraph Sixteen herein are deceptive and unfair.

PAR. 18. In the further course and conduct of its aforesaid business, respondent Queen Creek has, with respect to its various subdivisions, made representations through advertising, promotional materials and oral statements that the growth of land values at its subdivisions has corresponded and still corresponds to the growth of land values in certain other geographical areas. Through the use of such advertisements and oral statements, respondent has represented and is representing, directly or by implication, that lot values at its subdivisions increase at a rate comparable to those of certain other geographical areas. In truth and in fact, lot values at respondent's

subdivisions do not bear any significant relation to land values in these other geographical areas and do not increase at a rate similar thereto. Therefore the acts and practices described herein are deceptive and unfair.

PAR. 19. In the further course and conduct of its aforesaid business, respondent Queen Creek has represented directly or by implication, that land being offered for sale in its subdivisions would soon be unavailable, and therefore that prospective purchasers must purchase lots immediately or risk being unable to do so.

PAR. 20. In truth and in fact, respondent Queen Creek's land holdings at the subdivisions were and are so substantial that prospective purchasers could wait a substantial period of time and still be able to obtain land in respondent's subdivision. Therefore, the acts and practices alleged in Paragraph Nineteen herein are deceptive and unfair.

PAR. 21. In the further course and conduct of its aforesaid business, respondent Queen Creek has made oral statements concerning the location of the lots offered for sale. By and through such statements, respondent has represented and is representing, directly or by implication, that prospective purchasers must purchase immediately to ensure that they can obtain what respondent's employees refer to as "desirable locations."

PAR. 22. In truth and in fact, purchasers could wait a substantial amount of time and still have a substantial choice of lots with locations as "desirable" as those offered at the time the representations alleged in Paragraph Twenty-One are made. Therefore, the acts and practices alleged in Paragraph Twenty-One herein are deceptive and unfair.

PAR. 23. In the further course and conduct of its aforesaid business, respondent Queen Creek, with regard to the Valle Vista subdivision, has used advertisements, pamphlets, oral statements, and slides to give prospective purchasers the impression that Valle Vista will provide all the comforts of suburban living because it is near the city of Kingman, Arizona, that employment opportunities exist in the area, that industry is expected to relocate in the area, and that Valle Vista will prosper by virtue of the fact that it abuts U.S. Highway 66.

PAR. 24. In truth and in fact, Valle Vista does not offer the comforts of suburban living as that term is commonly used, the Kingman area does not offer sufficient employment opportunities to absorb an influx of significant numbers, industry is not expected to relocate, and prosperity could not reasonably be expected to follow because Valle Vista abuts U.S. Highway 66. Therefore, the acts and practices

set forth in Paragraph Twenty-Three herein are deceptive and unfair.

PAR. 25. In the further course and conduct of its aforesaid business, respondent Queen Creek has made various oral statements in sales presentations concerning the import or significance of signing the agreement to purchase respondent's land. By and through such statements, respondent has represented directly or by implication that by signing a contract the purchaser is not entering into a binding obligation to purchase land, thus obscuring the legal or practical significance of signing a contract.

PAR. 26. In truth and in fact, respondent Queen Creek treated the agreement to purchase as a binding legal obligation upon its execution. Therefore, the acts and practices alleged in Paragraph Twenty-Five are deceptive and unfair.

PAR. 27. In the further course and conduct of its aforesaid business, respondent Queen Creek has made reference to stocks, annuities, and other forms of investment. By and through these references respondent has represented that the purchase of its land is a stable and secure investment.

PAR. 28. In truth and in fact the purchase of respondent's land is not a secure and stable investment, and the mere mention of the forms of investment described in Paragraph Twenty-Seven above during the course of a presentation, the purpose of which is to sell land, is an unfair and deceptive act or practice.

PAR. 29. In the further course and conduct of its aforesaid business, respondent Queen Creek has utilized contract provisions which are not understandable to many consumers or cannot be evaluated by many consumers. Respondent has made the contract available to prospective purchasers, solicited and obtained signatures to the contract from purchasers in circumstances where the purchasers did not have the opportunity to seek assistance of counsel or other professional advice to aid in understanding said provisions. Respondent has discouraged purchasers from obtaining assistance of counsel or other professional advice in order to understand said provisions. The soliciting or obtaining of an agreement to purchase respondent's land, involving a substantial financial commitment by the purchaser, when the purchaser has not had an opportunity to seek assistance of counsel or other professional advice, and the discouragement of purchasers who wish to seek assistance of counsel before entering into such an agreement, constitute unfair acts or practices.

PAR. 30. In the further course and conduct of its aforesaid business, respondent has utilized artificial and deceptive photographic techniques, including the use of wide-angle lenses, in the production of

brochures and pamphlets in promoting the sale of land in its subdivisions. Typical of brochures produced in this manner was one which distorted the size of lakes at the Cordes Lakes subdivision. The use of such artificial and deceptive photographic techniques is an unfair and deceptive practice.

PAR. 31. Respondent Queen Creek's land sale contracts contain a declaration by the purchaser that the purchaser understands that no agent or representative of the seller shall have any authority whatsoever to make any representation on behalf of the seller aside from what is stated in the written contract. Use by respondent of the aforesaid declaration is an unfair and deceptive act or practice because respondent and its employees make representations, through advertisements and publications of general circulation, in promotional materials, and in sales presentations by means of oral statements, slides and movies, which differ in material respects from, or which obscure, the rights and obligations of the purchaser and of the respondent.

PAR. 32. Respondent Queen Creek's land sale contracts and promissory notes contain a clause which provides that if the purchaser defaults on installment payments or otherwise fails to perform any obligation under the contract, the seller shall be entitled to retain sums previously paid thereunder by the purchaser in excess of the seller's actual damages. Use by respondent of the aforesaid forfeiture provision is an unfair act or practice.

PAR. 33. In the further course and conduct of its aforesaid business, respondent Queen Creek made it known to purchasers and prospective purchasers that they had a right to cancel the contract for sale of land, if upon visiting the site within six months of purchase they were dissatisfied with the lot. Respondent maintained sales personnel at the subdivision sites ostensibly to serve as guides for the visiting owners and as on site salesmen. However, respondent's salesmen actually used these visits by owners to sell more land to the owners and to discourage owners from exercising their cancellation privilege. The use by respondent of the site visits to vitiate the effect of the 6-month refund provision and to promote the sale of additional lots constitutes an unfair act or practice.

PAR. 34. Respondent Queen Creek through its agents and representatives has represented to prospective purchasers that construction financing of single and multi-family dwellings, and engineering design and construction services for dwellings in respondent's subdivisions would be easily obtained.

PAR. 35. In truth and in fact, purchasers have experienced problems in obtaining home construction financing, and respondent

Queen Creek has no single or multi-family dwelling design or construction capability. Therefore, the representations alleged in Paragraph Thirty-Four constitute unfair and deceptive acts or practices.

PAR. 36. In the further course and conduct of its aforesaid business, respondent Queen Creek has, through oral statements and other means, represented that certain facilities or improvements, including an 18-hole golf course, large lakes for boating and fishing, fully paved roads and underground utilities, are presently available, or will be available in the near future at Valle Vista, Cordes Lakes and Verde Village, respectively.

PAR. 37. In truth and in fact, the facilities or improvements referred to in Paragraph Thirty-Six are not now and will not soon be made available, or said facilities were inadequately engineered and constructed at the subdivisions so as to be practically unavailable. Therefore, the acts and practices alleged in Paragraph Thirty-Six herein are deceptive and unfair.

PAR. 38. In the further course and conduct of its aforesaid business, respondent Queen Creek has induced members of the public through deceptive and unfair acts and practices to pay to respondent substantial sums of money towards the purchase of lots in respondent's developments. Respondent has received and is receiving the said sums, and has failed to construct the claimed improvements and amenities in a timely and adequate manner. Respondent's continued failure to construct the represented improvements and amenities without refunding money to purchasers, as alleged in this paragraph, constitutes an unfair act or practice.

PAR. 39. In the further course and conduct of its aforesaid business, respondent Queen Creek has made various written and oral statements to the public concerning the purpose of contacting members of the public and inviting them to dinner parties or other gatherings, or the purpose of offering goods and services free or at low cost. By and through such statements respondent has represented, directly or by implication, that the purpose in inviting members of the public to dinner parties or other gatherings, or in offering goods or services free or at low cost, was to inform people of the land situation in general, or to accomplish some purpose other than attempting to get invitees to sign contracts for the purchase of undeveloped land.

PAR. 40. In truth and in fact, respondent Queen Creek's purpose in contacting members of the public or holding dinner parties or other gatherings, or in offering goods or services free or at low cost, was to induce the signing of contracts for the purchase of respondent's land.

Therefore, the acts and practices alleged in Paragraph Thirty-Nine are deceptive and unfair.

PAR. 41. In the course and conduct of its aforesaid business, respondent Queen Creek has presented purchasers with a contract, a property report required to be provided to the purchaser by federal or state law, and in some instances additional lengthy or detailed documents. These documents contain information and provisions which could affect the decision of certain consumers on whether to sign a contract for the purchase of respondent's land. Respondent frequently has made the aforesaid documents available only at dinner parties or other gatherings sponsored by respondent in circumstances where it is likely that many purchasers will not read or fully comprehend the meaning and impact of such documents. In many instances respondent has withheld reports required to be provided to the purchaser by state or federal law until after an agreement is signed, which practice is in violation of federal or state laws. Withholding such crucial information and selling land under such circumstances, involving a substantial financial commitment by the purchaser, is a deceptive and unfair act or practice.

PAR. 42. In the further course and conduct of its aforesaid business, respondent Queen Creek has made oral statements and representations to members of the public concerning the present and future development of its subdivisions. By and through such statements and representations, respondent has represented, directly and by implication, that its subdivisions will, in the near future, be developed at least to the extent that all or most lots will be useable as homesites, with potable water, electricity and telephone service available without extraordinary charges for hook-up to said utilities, and that acceptable subdivision roads and drainage systems and structures would be constructed.

PAR. 43. In truth and in fact, respondent's subdivisions are not and will not in the near future be developed to the extent that all or most lots will be useable as homesites, with potable water, electricity, and telephone service available without extraordinary charges for hook-up to said utilities, and acceptable roads and drainage systems and structures. Therefore, the acts and practices alleged in Paragraph Forty-Two herein are deceptive and unfair.

PAR. 44. In the further course and conduct of its aforesaid business, respondent Queen Creek has represented, directly or by implication, that the particular lot a purchaser buys will, in the near future, or at some specifically stated time, be useable as a homesite, with potable water, electricity, and telephone service available without extraordinary charges for hook-up to said utilities.

PAR. 45. In truth and in fact, many purchasers bought lots which were not useable as homesites, because potable water, electricity and telephone service were not made available without extraordinary charges, or were not available within the near future or such specifically stated time. Therefore, the representations alleged in Paragraph Forty-Four constitute deceptive and unfair acts or practices.

PAR. 46. In the further course and conduct of its aforesaid business, respondent Queen Creek has endorsed promissory notes executed by purchasers to other financial institutions, continued to collect payments from purchasers, and, when mortgages had been satisfied, were unable to deliver to purchasers a satisfaction of mortgage and thus clear title. The use by respondent of the aforesaid procedure constitutes an unfair act or practice.

PAR. 47. The use by respondent of the aforementioned unfair and deceptive statements, representations, and practices has had, and now has, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements were, and are, true, and to cause the purchase of substantial numbers of respondent's lots because of said mistaken and erroneous belief.

PAR. 48. The above acts and practices, as herein alleged, were and are all to the prejudice and injury of the public and respondent's competitors and constituted, and now constitute, unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Los Angeles Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comment filed thereafter pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Flagg Industries, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 10960 Wilshire Boulevard, in the City of Los Angeles, State of California.

Respondent Queen Creek Land and Cattle Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Arizona, with its office and principal place of business at 3500 North Central Ave. in the City of Phoenix, State of Arizona.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondents, Flagg Industries, Inc., a corporation, and Queen Creek Land and Cattle Company, a corporation, their successors and assigns, and respondents' officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, or sale of land or other real property in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Misrepresenting, directly or by implication, the financial strength, size, and diversity or extent of assets of respondents.

2. Representing, either orally or in writing, directly or by implication:

a. That the vacant lots which respondents are offering for sale constitute a good or excellent investment, that significant monetary gain can be achieved, or that there is little or no financial risk involved in the purchase of respondents' lots.

b. That the resale of a vacant lot purchased from respondents is not difficult.

c. That the value of land at respondents' subdivisions is rising or will rise in the future.

d. That the prices of respondents' lots periodically rise or that prices are increasing, have increased, or will increase, without clearly and conspicuously disclosing at the same time, and by the same medium by which the price increases are communicated, that the price increases do not in any way relate to the value of land, and that the value of land to purchasers does not appreciate proportionately with the price rises.

e. That the purchase of a lot in one of respondents' subdivisions is a way to achieve financial security, to deal with inflation, or to become wealthy.

f. That the value of, or demand for, any land, including lots being offered for sale or previously sold by respondents, has increased, or will or may increase, or that purchasers have made, or will or may in the future make, a profit by reason of having purchased respondents' land.

g. That the growth in land values or potential growth in land values at respondents' subdivisions corresponds to or will correspond to the growth in land values of any other locality, or in any way comparing land values or potential growth in land values at respondents' subdivisions to land values or potential growth in land values in any other locality. The word "locality" includes, but is not limited to, cities, towns, counties, townships, boroughs, states and regions.

h. That land in respondents' subdivisions will soon be unavailable or otherwise scarce, or that land in any particular subdivision of respondents will soon be unavailable.

i. That prospective purchasers must purchase a lot immediately to ensure that a particular location will be available.

j. That respondents' subdivisions offer the comforts of suburban living, or that respondents' subdivisions are other than isolated, sparsely populated areas.

k. That jobs for purchasers who decide to move to any of respondents' subdivisions will be obtainable, without specifying exactly which jobs are currently available for people with the prospective purchasers' qualifications and salary requirements.

l. That new industry is moving to any of respondents' subdivisions, unless the industry is actually moving onto the subdivision itself, and unless respondents describe exactly what industry or industries is or are moving to the subdivision or subdivisions, when

such moves are to take place, and the number and types of jobs which will be made available.

m. That new industry is moving near respondents' subdivisions, unless the industry is actually moving and unless respondents describe exactly which subdivision or subdivisions, the mileage from the subdivision or subdivisions, to the site of the industry or industries, when such moves are to take place, and the number and types of jobs which will be made available.

n. That any of respondents' subdivisions will prosper in any way by virtue of its location.

o. That persons being solicited to purchase respondents' property are not entering into a legally binding obligation, merely making a refundable deposit, reserving the property, not making a final decision regarding purchase of property, or in any manner whatsoever obscuring the legal or practical significance of signing a land sale contract, promissory note or any other instrument.

Provided, however, that respondents may make those representations in the sale of land for which there is a documented reasonable basis to believe that such representations are true. Said documentation shall be made available to Commission staff upon request to review during reasonable business hours.

3. Making any statements or representations which in any manner refer to or concern investments in stocks, annuities or any other form of investment.

4. In any way discouraging prospective purchasers from obtaining the assistance of counsel or other professionals in order to understand the provisions of respondents' land sales contracts, promissory notes, or other documents, or make other determinations as to the advisability of purchasing respondents' land.

5. Using any motion pictures, still pictures, or other depictions in any type of sales presentation or promotional material unless such motion pictures, still pictures, or depictions are in fact genuine and accurate representations of the material or location presented therein.

6. From the date this order becomes final, including in any contract for the sale of land, or in any other document shown or provided to purchasers or prospective purchasers of land, whether or not signed by such purchasers or prospective purchasers, language to the effect that verbal representations have not been made in connection with the sale, or that no express or implied representations have been made in connection with the sale or offering for sale of land.

7. From the date this order becomes final, including in any

contract for the sale of land, or in any document shown or provided to purchasers or prospective purchasers of land, whether or not signed by such purchasers or prospective purchasers, language to the effect that upon failure of the purchaser to pay an installment due under the contract or otherwise to perform any obligation under the contract, the seller shall be entitled to retain sums previously paid thereunder by the purchaser in excess of the seller's actual damages.

8. Using site visits afforded purchasers in connection with a right of cancellation to vitiate in any way that right or attempt to sell additional land.

9. Misrepresenting or obscuring the right of a purchaser under any provision of respondents' contract or of this order, or under any applicable statute or regulation, to cancel a transaction or receive a refund.

10. Misrepresenting that financing for the construction of dwellings on subdivision lots is available or that respondents offer design or construction services.

11. Misrepresenting orally or in writing the present or future extent of development in any of respondents' subdivisions.

12. a. Representing that respondents will provide, or that respondents' subdivisions will have available, any facility or improvement, other than the utilities treated separately in paragraph 2 of Section III of this order, unless respondents' contracts or promissory notes at the time of the representation contain (i) a legal obligation on the part of respondents to provide or make available said facilities and improvements at a date certain, not later than 10 years from the date of purchase, set out clearly and conspicuously in the document, and (ii) a statement as to the cost to the purchaser, if any, for such facilities or improvements.

b. Failing to express the aforesaid contractual obligations set out in subparagraph a. above in the contract or promissory note with the purchaser in the following manner:

(i) A complete description of each improvement or facility to be provided or made available;

(ii) A provision that in the event any of the improvements or facilities specified in the instrument are not completed within six months of the time provided in the contract, respondents will immediately, upon the expiration of said six-month period, provide the purchaser by certified mail, return receipt requested, with notice of such unavailability of or failure to complete the aforesaid improvements or facilities, and of the purchaser's right to exercise within 30 days of receipt of said notice his option to exchange his lot

or to cancel and receive a full refund as set out in subparagraph (iii) below;

(iii) An option to the purchaser stated substantially as follows:

> In the event that any of the improvements or facilities specified by the seller in this instrument are not available to the lot which is the subject of this instrument, or are not completed within six months of the time provided in this instrument, the purchaser may elect, at his option, to (1) receive, at no additional expense to the purchaser, an exchange acceptable to the purchaser of other property of at least equal price, equivalent size, and with those improvements contracted for, or (2) cancel this instrument and receive from the seller a full refund of all monies paid hereunder plus the legal rate of interest, compounded annually. To exercise this option, the purchaser must give notice to the seller by registered or certified mail within 30 days after receipt of notice from the seller of such unavailability of or failure to complete the aforesaid improvements or facilities.

(iv) Where Acts of God delay the construction of improvements, a reasonable extension of the six-month time period in the instrument does not violate this order and the purchaser's option does not operate until said reasonable time has elapsed. *Provided, however,* respondents shall notify purchaser of said Act of God in accordance with the above.

Subsections a. and b. above shall apply to all contracts, promissory notes, or other binding documents executed after the date this order becomes final.

c. Failing to make the exchange or refund requested by a purchaser under the terms of this paragraph of the order within seventy-five (75) days of receipt of notification from the purchaser.

d. Soliciting or obtaining the purchaser's assent to a waiver or limitation or otherwise imposing any condition upon the right of a purchaser to an exchange or a refund as set out in this paragraph.

II

It is further ordered, That respondents, their successors and assigns, and respondents' officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, or sale of land or other real property in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith:

1. Include, clearly and conspicuously, in any written or oral invitation or other communication concerning any event or activity, dinner parties or other gatherings, awards of free or low cost gifts, sightseeing tours, or any other goods or services, which invitation or

other communication is in any manner related to the sale of land, the following statement: "The purpose of [the event or activity] is to persuade you to sign a contract for the purchase of undeveloped land in [name of state in which land is located] at a cost of approximately [average contract price in the subdivision during previous year rounded off to nearest $500 or, in the case of a new subdivision, average offering price rounded off to nearest $500]."

If said invitation or communication is in writing, such disclosure shall be in writing and shall be made clearly and conspicuously in the invitation or communication; if the invitation or communication is oral such disclosure shall be made orally during the telephone invitation or communication, and in writing by mail to be received by the prospective purchaser at least three days prior to the event or activity; *provided, however,* that in the case of consumers already within the state within which the subdivision is located, such disclosure may be made one day prior to a tour, or site visit, so long as (a) all written materials given to such consumers make such a disclosure in print as large as the largest print in such materials, and (b) all agents of respondents who promote the tour and all employees of respondents who in any way attempt to influence consumers' decisions orally inform consumers of the purpose of the tour or site visit.

2. a. Include, clearly and conspicuously, in all sales presentations, promotion materials, and advertising, other than TV or radio advertisements, in the same size type as that which is predominantly used in such material, the following statement:

> YOU SHOULD CONSIDER THE PURCHASE OF OUR LAND TO BE RISKY. THE FUTURE OF THIS LAND IS UNCERTAIN—DO NOT COUNT ON AN INCREASE IN ITS VALUE. IT HAS NOT GENERALLY BEEN POSSIBLE FOR PURCHASERS OF LAND FROM [SELLING RESPONDENT] TO RESELL THE LAND AT A PROFIT. PURCHASERS GENERALLY HAVE BEEN UNABLE TO RESELL THE LAND AT ALL. IT IS SUGGESTED THAT YOU DISCUSS ANY POSSIBLE PURCHASE WITH A LAWYER, BANKER OR OTHER QUALIFIED PROFESSIONAL.

b. Include, clearly and conspicuously, in all TV and radio advertisements, the following statement:

> YOU SHOULD CONSIDER THE PURCHASE OF ANY OF OUR LAND RISKY.

3. Set forth on the first page of any contract for the sale of land in 24-point type, "CONTRACT FOR THE PURCHASE OF LAND." with no other writing except that required by the following paragraph and paragraph 2. of Section III of this order.

4. Print the following in 12-point boldface type as the only writing

in addition to that required by paragraph 3. of Section II and paragraph 2. of Section III of this order, on the first page of all contracts for the sale of land:

THIS IS A CONTRACT BY WHICH YOU AGREEE TO PURCHASE LAND. YOU SHOULD NOT CONSIDER THIS PURCHASE AS AN INVESTMENT. THE FUTURE VALUE OF THIS LAND IS UNCERTAIN—DO NOT COUNT ON AN INCREASE IN ITS VALUE. IN FACT, THERE IS GENERALLY NO RESALE MARKET FOR THIS LAND; PREVIOUS PURCHASERS HAVE, FOR THE MOST PART, FOUND IT IMPOSSIBLE TO SELL THE LAND AT ALL, MUCH LESS AT A PROFIT.

IT IS THEREFORE SUGGESTED THAT YOU CONSIDER YOUR NEEDS CAREFULLY, AND HAVE BOTH THIS CONTRACT AND THE PROPERTY REPORT REVIEWED BY A LAWYER, BANKER OR OTHER QUALIFIED PROFESSIONAL.

WHILE YOU HAVE 10 DAYS IN WHICH TO RECONSIDER YOUR DECISION AND CANCEL THIS CONTRACT WITH FULL REFUND, WE RECOMMEND THAT YOU NOT SIGN UNTIL EXERCISING THE CARE SUGGESTED IN THE PREVIOUS PARAGRAPH.

_____ _____

Signature Date

No contract or other legally binding instrument for the sale of respondents' land shall be valid unless this statement is signed and dated by the purchaser after he has had a reasonable amount of time to read the whole page.

5. a. Furnish each purchaser, at the time the purchaser signs a contract or other document for the sale of land, with a copy of the contract or other document and two copies of the following form. The title of the form shall be "NOTICE OF RIGHT OF CANCELLATION" printed in 12-point type and the form shall contain in 10-point boldface type the following information and statements.

_____

Date of Transaction

_____

Contract Number

NOTICE OF CANCELLATION

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, AT ANY TIME PRIOR TO MIDNIGHT OF THE TENTH BUSINESS DAY AFTER THE DATE SHOWN ON THE CONTRACT.

IF YOU CANCEL, ANY PAYMENT MADE BY YOU UNDER THE CONTRACT AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL

BE RETURNED WITHIN TEN BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF THE CANCELLATION NOTICE.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM TO [*name of selling respondent*] AT [*address of respondent's place of business*] NOT LATER THAN MIDNIGHT OF [*Date*]

I (WE) HEREBY CANCEL THIS TRANSACTION. (EACH PURCHASER MUST SIGN THIS NOTICE.)

_____ _____

[Date] [Signature of purchaser]

b. Complete both copies before furnsihing this "Notice of Right of Cancellation" to the purchasher, by entering the name of the selling respondent, the address of the respondent's place of business, the date of the transaction, the contract number, and the date, not earlier than the tenth business day following the date of transaction, by which the purchaser may give notice of cancellation. The term "selling respondent" as required by this order shall mean Queen Creek Land and Cattle Company, its successors or assigns or any other dba used in selling land.

c. Where a timely notice of cancellation is received and said notice is not properly signed, and respondents do not intend to honor the notice, respondents shall immediately notify the purchaser by certified mail, return receipt requested, enclosing the notice, informing the purchaser of his error, and stating clearly and conspicuously that a notice signed by the purchaser must be mailed to respondents by midnight of the seventh business day following the purchaser's receipt of the mailing if the purchaser is to obtain a refund.

d. Where the signature of a prospective purchaser is solicited during the course of a sales presentation, inform each person orally, at the time he signs the contract, or other legally binding instrument, of his right to cancel as stated above.

6. Include, clearly and conspicuously, in each contract or other document for the sale of land the following statement in 12-point boldface type.

PURCHASER HAS THE RIGHT TO CANCEL THE CONTRACT WITHOUT ANY PENALTY OR OBLIGATION AT ANY TIME PRIOR TO MIDNIGHT OF THE TENTH BUSINESS DAY AFTER THE DATE OF THIS CONTRACT.

SHOULD PURCHASER CHOOSE TO CANCEL PURSUANT TO THIS PROVISION, ANY PAYMENTS MADE BY PURCHASER UNDER THIS CONTRACT AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY PURCHASER WILL BE RETURNED WITHIN TEN BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF THE CANCELLATION NOTICE.

TO CANCEL THE TRANSACTION, PURCHASER MUST MAIL OR DELIVER A SIGNED COPY OF THE NOTICE OF RIGHT OF CANCELLATION FURNISHED BY SELLER, A TELEGRAM, OR ANY OTHER WRITTEN NOTICE TO [*selling respondent*] AT [*selling respondent's place of business*] NOT LATER THAN MIDNIGHT OF THE TENTH BUSINESS DAY AFTER THE DATE OF THIS CONTRACT.

7. Honor any signed and timely notice of cancellation by a purchaser, and within 10 business days after the receipt of such notice (a) refund all payments made under the instrument, and (b) cancel and return any negotiable instrument executed by the purchaser in connection with the contract.

8. Send to prospective purchasers (1) copies of all reports required by either federal or state law and (2) copies of all materials required by this order, along with any invitation or other communication inviting the prospective purchaser to attend a land sales dinner.

9. If the land is to be sold other than at a land sales dinner, furnish (1) copies of all reports required by federal or state law to be furnished to a purchaser of respondents' land at or before the signing of a legally binding instrument and (2) copies of all materials required to be furnished by this order, with the first written materials or during the first contact which the prospective purchaser has with respondents or any of their agents or employees.

10. Inform orally and in writing all prospective purchasers of vacant land that home financing may not be available, and that a bank located near the subdivision should be consulted prior to the purchase of land if the purchaser intends to build or purchase a house on that land.

11. Whenever respondents offer a refund contingent upon the purchaser taking a company-guided inspection tour or making a registered inspection of the property in which the purchaser's lot is located:

a. Provide the purchaser three business days after taking tour or making said inspection within which to request a refund;

b. Include in any contract, or other legally binding instrument, in immediate proximity to the provision setting forth the availability of a refund upon completion of a company-guided inspection tour or registered inspection of the property, the following statement:

YOU, THE PURCHASER(S), HAVE AN ADDITIONAL RIGHT TO CANCEL THE TRANSACTION IF YOU TAKE THE COMPANY-GUIDED TOUR OR MAKE A REGISTERED INSPECTION OF THE PROPERTY AND NOTIFY THE COMPANY OF YOUR INTENTION TO EXERCISE THE RIGHT TO CANCEL PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF SUCH TOUR OR INSPECTION.

c. Orally inform the purchaser at the time the instrument is signed and at the time the tour is taken or the inspection is registered of this cancellation right.

d. Furnish each purchaser at the completion of the tour or inspection a completed form in duplicate, captioned "NOTICE OF CANCELLATION," which shall contain in boldface type of a minimum size of 10 points the following statements:

NOTICE OF CANCELLATION

[*Date of company-guided inspection tour of property*]

[*Contract number*]

YOU MAY CANCEL YOUR CONTRACT OR PROMISSORY NOTE WITHOUT ANY PENALTY OR OBLIGATION, AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE ABOVE DATE.

IF YOU CANCEL, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT WILL BE RETURNED WITHIN 10 BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF YOUR CANCELLATION NOTICE:

TO CANCEL YOUR CONTRACT OR PROMISSORY NOTE, MAIL OR DELIVER A SIGNED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM TO: [*Name of selling respondent*], [*address of selling respondent's place of business*], NOT LATER THAN MIDNIGHT OF _____.

I (WE) HEREBY CANCEL THE CONTRACT. (EACH PURCHASER MUST SIGN THIS NOTICE.)

_____

(Date)

_____

(Purchaser's signature)

_____

(Purchaser's signature)

e. Before furnishing the purchaser copies of the "Notice of Cancellation" set forth in subparagraph d. above, complete both copies by entering the name of the selling respondent and the address of its place of business, the date of the company-guided inspection tour or the registered inspection of the property, and the date, not earlier than the third business day following the date of the last contact in connection with said tour or inspection by which the purchaser may give notice of cancellation.

f. If respondents condition the right of cancellation referred to

above upon a tour or registered inspection, respondents shall insure that a representative is on the site during reasonable daylight hours to register inspections.

g. Where a timely notice of cancellation is received from a purchaser purportedly in accordance with the requirements of this paragraph of the order, but where said notice is not properly signed, and respondents do not intend to honor the notice, respondents shall immediately notify the purchaser by certified mail, return receipt requested, enclosing the notice, and a new cancellation form; said notice shall inform the purchaser of his error and state clearly and conspicuously that a notice signed by the purchaser must be mailed by midnight of the seventh day following the purchaser's receipt of the mailing if the purchaser is to obtain a refund.

III

It is further ordered, That respondents, their successors and assigns, and respondents' officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, or sale of land or other real property in or affecting commerce, as defined in the Federal Trade Commission Act, do forthwith cease and desist from advertising for sale, offering for sale, contracting to sell, or selling any interest in:

1. Any land represented in any manner as being useable now or in the future as a homesite, unless either:

a. At the time of sale all of the conditions set forth below are met, or

b. The selling respondent's contract with the purchaser contains a legal obligation on the part of respondents to meet the conditions set forth below within five years of the date of the sale.

The conditions to be met by respondents are as follows:

(1) The purchaser must have available an adequate sewage system by means of:

(a) A septic tank, or

(b) A central sewage system, the hook-up to which will cost the purchaser only a reasonable and customary branch-line extension fee;

provided, that respondents must include in the contract whether a septic tank will be necessary or whether a central sewage system will be available, and the approximate amount which a septic tank would cost to install or a central sewage system would cost to hook up to,

including an estimate of the amount said fee will increase over the next five years.

(2) The purchaser must be able to obtain potable water by hooking up to a central water system solely by payment of a reasonable and customary branch-line extension fee; *provided,* that respondents must include in the contract the approximate amount of said extension fee, including an estimate of the amount said fee will increase over the next five years.

(3) The purchaser must be able to obtain standard electricity and telephone service from a local utility authorized to do business in the state in which the land is located, which service will cost the lotholder only nominal hook-up and installation fees and customary and usual rates; *provided,* that respondents must include in the contract the approximate amount of said hook-up and installation fee, including an estimate of the amount said fee will increase over the next five years.

If respondents fail for any reason to meet the conditions required by this paragraph, they shall refund to each purchaser to whom the obligations are not fulfilled all monies paid by such purchaser to respondents under the terms of the land sales contract, plus the legal rate of interest, compounded annually.

2. Any lot not covered in paragraph 1. above of this order provision, unless there shall appear as described in paragraph II 4., as additional paragraphs required by paragraph II 4., such of the following statements as are applicable:

a. For contracts for the sale of lots as to which neither respondents nor any other party is legally obligated to make a central sewer system available, add the following, including the third sentence only where applicable:

> A CENTRAL SEWER SYSTEM WILL NOT BE AVAILABLE WHEN YOU HAVE COMPLETED YOUR CONTRACT PAYMENTS. INSTALLATION OF A SEPTIC TANK WOULD BE AT YOUR EXPENSE. HOWEVER, THE USE OF A SEPTIC TANK ON YOUR LOT IS CONTINGENT ON APPROVAL BY GOVERNMENTAL AUTHORITIES.

b. (i) For contracts for the sale of lots to which neither respondents nor any other party is legally obligated to make available a central potable water system, and where water is not available on an aid-in-construction basis, add the following, including the third sentence only where applicable:

> A CENTRAL SYSTEM FOR POTABLE WATER WILL NOT BE AVAILABLE WHEN YOU HAVE COMPLETED YOUR CONTRACT PAYMENTS. INSTALLATION OF A WELL WOULD BE OF CONSIDERABLE EXPENSE TO YOU.

MOREOVER, IT MAY NOT BE POSSIBLE TO OBTAIN POTABLE WATER FROM A WELL IN SOME AREAS.

(ii) For contracts for the sale of lots to which neither respondents nor any other party is legally obligated to make a central water system available, and where water is available on an aid-in-construction basis, add the following, including the fourth sentence only where applicable:

A CENTRAL WATER SYSTEM WILL NOT BE AVAILABLE WHEN YOU HAVE COMPLETED YOUR CONTRACT PAYMENTS. IT MAY BE IMPOSSIBLE OR IMPRACTICAL TO OBTAIN WATER FROM A CENTRAL SYSTEM DUE TO THE HIGH COST OF MAKING THIS SERVICE AVAILABLE TO THIS AREA. INSTALLATION OF A WELL WOULD BE OF CONSIDERABLE EXPENSE TO YOU. MOREOVER, IT MAY NOT BE POSSIBLE TO OBTAIN POTABLE WATER FROM A WELL IN SOME AREAS.

(iii) For contracts for the sale of lots to which neither respondents nor any other party is legally obligated to make a central system for potable water available, where water is available on an aid-in-construction basis, and there are legal restrictions on drilling for water, add the following, including the third sentence only where applicable:

A CENTRAL WATER SYSTEM WILL NOT BE AVAILABLE WHEN YOU HAVE COMPLETED YOUR CONTRACT PAYMENTS. IT MAY BE IMPOSSIBLE OR IMPRACTICAL TO OBTAIN WATER DUE TO THE HIGH COST OF MAKING THIS SERVICE AVAILABLE TO THIS AREA. INSTALLATION OF A WELL IS PROHIBITED IN SOME AREAS.

c. For contracts for the sale of lots to which electricity and telephone service will only be available to the purchaser on an aid-in-construction basis, add the following:

IT MAY BE IMPOSSIBLE OR IMPRACTICAL TO OBTAIN ELECTRICITY AND TELEPHONE SERVICE DUE TO THE HIGH COST OF MAKING THESE SERVICES AVAILABLE TO THIS AREA.

d. For contracts for the sale of lots to which respondents or any other party is legally obligated only to provide unpaved roads with no maintenance obligations, add the following in lieu of all of the above:

THIS COMPLETELY UNDEVELOPED LAND IS BEING SOLD "AS IS." ELECTRICITY, WATER, SEWER AND TELEPHONE SERVICE ARE NOT PLANNED FOR THIS SUBDIVISION AND MAY BE IMPOSSIBLE FOR YOU TO OBTAIN AT A REASONABLE COST. YOUR LOT WILL BE ACCESSIBLE, IF AT ALL, ONLY BY UNPAVED ROADS WHICH WILL NOT BE MAINTAINED. THE USE OF SUCH ROADS MAY BE IMPOSSIBLE WITHOUT MAINTENANCE. YOUR LOT HAS VIRTUALLY NO USE AT PRESENT OR IN THE FORESEEABLE FUTURE.

e. For contracts for the sale of lots to or on which neither respondents nor any other party is legally obligated to provide any improvements, add the following in lieu of all of the above:

> THIS COMPLETELY UNDEVELOPED LAND IS BEING SOLD "AS IS." ELECTRICITY, WATER, SEWER, AND TELEPHONE SERVICE ARE NOT PLANNED FOR THIS SUBDIVISION AND MAY BE IMPOSSIBLE FOR YOU TO OBTAIN AT A REASONABLE COST. NO ROADS ARE PLANNED AND YOUR LOT IS PROBABLY INACCESSIBLE BY CONVENTIONAL TRANSPORTATION. YOUR LOT HAS VIRTUALLY NO USE AT PRESENT OR IN THE FORESEEABLE FUTURE.

f. For contracts for the sale of lots in any of respondents' properties in which purchasers are required to join an improvement association which is obligated to spend accumulated funds for improvements to and services for lots such as, but not limited to, central water and sewer systems, telephone and electrical services, road maintenance and paving, add the following:

> YOU ARE OBLIGATED BY THIS CONTRACT TO JOIN AND MAKE REGULAR PAYMENTS ESTIMATED TO BE [estimated *annual* cost] TO [name of association]. THE [name of association] IS LEGALLY OBLIGATED TO [name of selling respondent], BUT NOT TO YOU, TO USE SUCH FUNDS TO PROVIDE UTILITIES AND OTHER IMPROVEMENTS TO AND SERVICES FOR YOUR LOT. HOWEVER, YOU MUST MEET CERTAIN ADDITIONAL PAYMENTS, AS SET FORTH IN THE CONTRACT, BEFORE YOU REQUEST THESE UTILITIES, IMPROVEMENTS, AND SERVICES.

g. For purposes of providing additional information to purchasers, respondents may advise purchasers of which governmental approvals have been granted in the past for private wells and septic tanks. This subsection, g., shall be in addition to disclosures required by Sections 2(a) and (b), and not in lieu thereof.

If respondents fail for any reason to make the disclosures required by this paragraph, they shall refund to each purchaser to whom the disclosures were not made all monies paid by such purchaser under the terms of the land sales contract when requested to do so by such purchaser.

IV

It is further ordered, That respondents, their successors and assigns, and respondents' officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the sale of land in their three subdivisions, shall provide all improvements, amenities, and facilities described in the HUD Property Reports in effect on the date of sale

and the additional improvements described below. Said requirements shall include both new construction and repair of existing improvements which are in a state of disrepair or were improperly constructed.

Improvements and amenities to be constructed at the respective subdivisions shall include, but not be limited to, the following:

1. Cordes Lakes

a. All subdivision roads, culverts and other drainage structures shall be constructed to minimum Yavapia County specifications, as those specifications required at the time construction began.

b. A low water crossing and an alternative access road for emergency use by residents of Units 5 and 6 to reach the main highway during flood stages of Big Bug Creek. The location of this access road shall be mutually agreed upon by respondents and the property owners' association.

c. All water lines shall be placed underground.

d. Drain, de-weed, and re-fill Crystal Lake. Crystal and Bass Lakes shall be filled and maintained at the highest level attained since their construction. Where modification of the water supply system is required to maintain this level, said modifications shall be accomplished.

e. All improvements and amenities set out in the Property Report, Notice and Disclaimer by Office of Interstate Land Sales Registration, U.S. Department of Housing and Urban Development, OILSR No. 0-0162-02-27(A) dated September 10, 1973, shall be completed using accepted construction standards for Yavapia County.

f. All construction shall be completed at Cordes Lake not later than April 30, 1977. All amenities constructed or still under construction by respondents shall not be conveyed to the property owners' association until these facilities are brought to a reasonable standard agreed to by respondents and the property owners' association. All improvements to be accepted for maintenance by the county shall be completed and accepted not later than April 30, 1977.

g. Title to all lots which have been designated as property to be dedicated for public use shall remain in respondents until such time as title is accepted by the appropriate Yavapia County or other public entity.

2. Verde Village

a. All roads in the subdivision shall be brought to Yavapia County standards for asphalt paved roads, as those standards existed when the roads were initially constructed.

b. All drainage channels, ditches, culverts and other structures

and facilities shall conform to Yavapia County standards and shall be consistent with accepted engineering and construction standards for the topography of the subdivision.

c. All lots on which the owner indicates to respondents that he intends to build shall be rough graded so as to require only normal filling and grading for construction of a residential structure. This requirement terminates when the improvements are accepted by the Yavapia County Engineer.

d. The existing water distribution system shall be checked, modified and upgraded where necessary to assure reasonably uniform line pressure and discharge rates to all occupied units and those units in which lots have been offered for sale. All water lines shall be placed underground.

e. Grade and restore recreation areas, and lots along Verde River. The owners of lots adjacent to the Verde River which have been damaged by respondents' employees or agents and which have not been restored within 60 days after this order becomes final shall be offered a full refund plus the legal rate of interest, or the right of exchange, at the owner's option.

f. Respondents shall contact, within 60 days of acceptance of this order by the Commission, the owner of each occupied lot in the subdivision to determine if said owner had to bear the cost of extending water, telephone, or electrical service to his property line. Where owners had to bear the cost, respondents shall reimburse that owner for those costs in a lump sum within ten days of notification and furnishing of proof by the lot owner.

g. All improvements and amenities set out in the Property Report, Notice and Disclaimer by Office of Interstate Land Sales Registration, U.S. Department of Housing and Urban Development, OILSR No. 0-1024-02-144(G) Amendment No. 1 dated September 10, 1973, shall be completed and accepted by Yavapia County Engineer not later than June 30, 1979.

h. All construction shall be completed at Verde Village not later than June 30, 1979. All amenities constructed or still under construction by respondents shall not be conveyed to the property owners' association until these facilities are brought to a reasonable standard agreed to by respondents and the property owners' association. All improvements to be accepted for maintenance by the county shall be completed and accepted not later than June 30, 1979.

i. Title to all lots which have been designated as property to be dedicated for public use shall remain in respondents until such time as title is accepted by the appropriate Yavapia County or other public entity.

3. Valle Vista

a. All subdivision roads shall be constructed to match existing roads in Unit One and shall meet Mojave County specifications for paved roads, as those specifications are interpreted by the Mojave County Engineer.

b. All culverts, drainage channels and ditches shall be constructed to Mojave County Specifications, or other required governmental flood control standards.

c. All lots on which the owner has indicated to respondents his intent to build shall be rough graded so as to require only normal filling and grading for construction of a residential structure. This requirement shall terminate on December 31, 1978.

d. Where future lots are approved for sale by the appropriate State of Arizona agency, respondents shall assure that Truxton Canyon Water Company, Inc., or another state approved water company can provide sufficient potable water to satisfy the expected demand.

e. All subdivision water lines shall be underground and shall supply potable water within standards established by the Arizona Health department and Water Commission for Total Dissolved Solids (TDS), fluorides and other impurities.

f. Respondents shall complete the 18-hole golf course, tennis court, swimming pool, shuffle board, park and other amenities as set out in the Property Report—Notice and Disclaimer by Office of Interstate Land Sales Registration, U.S. Department of Housing and Urban Development, dated December 17, 1974, not later than December 31, 1978.

g. Respondents shall maintain the roads, culverts and other drainage facilities, lakes, golf course, community center, swimming pool, and any other common facilities until such time as these facilities have been accepted by the County of Mojave or the subdivision property owners' association; *provided, however,* that under no circumstances shall respondents convey to the property owners' association any facility prior to those facilities meeting standards mutually agreed upon by respondents and the property owners' association. All roads, culverts and other drainage facilities, and other improvements shall be completed and accepted for maintenance by the Mojave County Engineer not later than December 31, 1978.

4. Funds advanced by respondents to the trust fund established under paragraph V of this order shall under no circumstances be used for maintenance of any common facility included in the

Property Reports referred to in this paragraph prior to acceptance by the association.

5. Failure to complete construction and secure acceptance by the appropriate county engineer within the time limits set out above at each of the subdivisions constitutes a continuing violation of this order.

V

It is further ordered, That respondents, their agents, representatives and employees shall:

1. Place in three separate trusts, for the benefit of each respective subdivision, Twenty Thousand Dollars ($20,000) per year for five years, to be divided among the three property owners' associations as follows:

a. Cordes Lakes: Eight Thousand Dollars ($8,000) per year

b. Verde Village: Eight Thousand Dollars ($8,000) per year

c. Valle Vista: Four Thousand Dollars ($4,000) per year

Expenditures by the associations shall be limited to physical improvements and maintenance of common facilities for the general benefit of each subdivision as a whole. The trustee of these funds shall be chosen by the respective property owners' association.

2. Within sixty (60) days after this order is final, withdraw from membership in the Cordes Lake and Verde Village property owners' associations. With respect to the Valle Vista property owners' association, respondents, their agents, representatives and employees shall, within sixty (60) days after this order is final, take or cause to be taken, such action as may be necessary, including but not limited to amendments to existing articles and/or by-laws of the association, which will embody the following conditions:

a. Respondents, their agents, representatives and employees shall not control, directly or indirectly, the determination as to the use of funds placed in trust under this order, other than advising the association as to what uses said funds might be put;

b. No present, past or future agent, representative or employee of respondents may serve as a director of the association;

c. Respondents, their agents, representatives and/or employees shall cause to be elected as directors of the association such owners

within the subdivision who are not, nor have ever been, employees, agents, or representatives of respondents, and do not have, nor have had, any relationship with respondents, their agents, representatives and employees which might tend in any way to influence and/or control, directly or indirectly the actions of such elected director, or the independent judgment of such elected directors in carrying out their fiduciary responsibilities, nor shall respondents, their agents, representatives and employees use the articles, by-laws or general corporation law to influence and/or control, directly or indirectly, the actions of such elected directors; and

d. Respondents, their agents, representatives and employees shall withdraw from membership in the association as soon as is practicable and reasonable under the circumstances, and in no event later than one year after the date on which this order becomes final.

VI

It is further ordered, That respondents, their successors and assigns, for purposes of future litigation arising out of their land sale activities, shall forbear from relying upon or asserting as a defense, the clause in the contract or other binding instrument containing language to the effect that no express or implied representations have been made in connection with the sale or offering for sale of respondents' land, other than those set forth in the contract or other instrument. Further, respondents, their successors and assigns, shall cease and desist from enforcing those provisions in their contracts or other binding instruments which operate to cause the purchaser to forfeit sums paid in installments upon default of any one installment payment. This section shall apply to contracts or other binding instruments presently in force and those to be used in future land sales transactions.

VII

It is further ordered, That respondents, their successors and assigns, agents, representatives and employees shall cease and desist from endorsing, discounting, assigning or in any other manner negotiating contracts, promissory notes, or other evidences of indebtedness by purchasers of lots in their subdivisions in such a manner or to such parties as to jeopardize or cloud the title or render the title unmarketable to the purchaser upon satisfaction of the mortgage.

VIII

It is further ordered, That respondents, their successors and assigns, and agents, representatives and employees shall:

1. Deliver a copy of this decision and order to each of their present or future salesmen and other employees, independent brokers, and all others who sell or promote the sale of lots in respondents' subdivisions.

2. Provide each person so described in the preceding paragraph with a form, returnable to the respondents clearly stating his intention to be bound by and to conform his business practices to the requirements of this order.

3. Inform all such present and future salesmen and other employees, independent brokers, and all others who sell or promote the sale of lots in respondents' subdivisions that respondents shall not use any person, or the services of any person, to sell or promote the sale of real estate unless such person agrees to and does file notice with the respondents that he will be bound by the provisions contained in this order. If any such person does not agree to so file notice with the respondents and be bound by the provisions of the order, the respondents shall not use such person, or the services of such person, to sell or promote the sale of real estate.

4. Institute a program of continuing surveillance adequate to reveal whether the business operations of each of said persons so engaged conform to the requirements of this order.

5. Discontinue dealing with the persons revealed by the aforesaid program of surveillance or by any other means who continue on their own the unfair or deceptive acts or practices prohibited by this order.

It is further ordered, That in the event that respondents transfer all or a substantial part of their business or assets to any other corporation, individual, partnership or other entity, including a transfer of all or part of the ownership interest of any or all of respondents' wholly-owned land sale subsidiary, respondents shall require said transferee to file promptly with the Commission a written agreement to be bound by the terms of this order; *provided,* that if respondents wish to present to the Commission any reasons why said order should not apply in its present form to said transferee, they shall submit to the Commission a written statement setting forth said reasons prior to the consummation of said business transfer. Failure to require that such transferee be bound under this order as set out in this paragraph shall be considered a continuing violation of this order.

It is further ordered, That respondents notify the Commission at

least thirty (30) days prior to any proposed change in the corporate respondents, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporations which may affect compliance obligations arising out of this order.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

UNION CARBIDE CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SECS. 3 AND 7 OF THE CLAYTON ACT

Docket C-2902. Complaint, Sept. 28, 1977 — Decision, Sept. 28, 1977

This consent order, among other things, requires a New York City producer of industrial gases and gas welding apparatus, for a 20-year period, to cease using any tying arrangement, or employing any exclusive dealing contract that is not for one year or less, or which fails to provide a 90-day or less period for notice of termination. Additionally, the firm is prohibited for a ten-year period from acquiring distributors of industrial gases or gas welding equipment without prior Commission approval, except where any of the prescribed conditions exist. Further, in those instances where prior approval is not required, Union Carbide must furnish the Commission with sufficient data so as to enable it to determine whether such acquisition violates the terms of the order.

Appearances

For the Commission: *Gordon Youngwood, Roger S. Leifer* and *Geoffrey S. Walker.*

For the respondent: *George A. Avery, Wald, Harkrader & Ross,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Union Carbide Corporation ("Union Carbide"), respondent herein, has violated the provisions of Section 3 of the Clayton Act, as amended (15 U.S.C. 14), and Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and the provisions of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and that a proceeding in respect thereof would be in the public interest, issues this complaint, stating its charges as follows:

DEFINITIONS

1. For the purpose of construing this complaint, the following definitions will apply:

(a) "Industrial Gases" shall mean the following gases: Oxygen, Nitrogen, Argon, Acetylene, Hydrogen and Helium.

(b) "Welding Products" shall mean equipment, supplies and consumable items used to fuse or cut metals.

(c) "Gas Welding Apparatus" shall mean the equipment used to fuse or cut metals by means of heat produced by a gas flame.

(d) "Distributor" shall mean a business firm whose primary function in the Industrial Gas and Welding Products business is the purchase of Industrial Gases and Welding Products for the purpose of resale, but shall not include any business firm whose primary function in the resale of Industrial Gases and Welding Products is the distribution of Industrial Gases and Welding Products to entities engaged in the plumbing, heating or air conditioning trade.

RESPONDENT

2. Respondent Union Carbide is a publicly owned New York corporation with its principal place of business at 270 Park Ave., New York, New York.

3. Union Carbide is engaged in the manufacture and sale of chemicals, plastics, industrial gases and related products, welding equipment, metals, carbon products and such consumer oriented products as batteries and antifreeze.

4. For 1975 Union Carbide had net sales of $5.7 billion and a net income of $382 million.

5. Union Carbide, the nation's leading producer of industrial gases, sells industrial gases and welding products through its Linde Division. During 1972, Union Carbide had the largest volume of domestic sales of acetylene, argon, helium, nitrogen and oxygen to distributors, and the third largest volume of domestic sales of hydrogen to distributors. During 1972, it was one of the nation's leading manufacturers of welding products.

6. At all times relevant herein Union Carbide sold and shipped its products in interstate commerce and engaged in commerce within the meaning of the Clayton Act, as amended, and was a corporation whose business was in or affected commerce within the meaning of the Federal Trade Commission Act, as amended.

COUNT I

TRADE AND COMMERCE

7. The relevant lines of commerce affected by the actions of Union Carbide are the sales to distributors of each of the following relevant industrial gases: acetylene, argon, helium, hydrogen, nitrogen and oxygen.

8. The relevant geographic market for each line of commerce is the United States.

9. During 1972, there were substantial sales by Union Carbide to

distributors of acetylene, argon, helium, hydrogen, nitrogen, and oxygen. Union Carbide is one of the major sellers of those six gases to distributors.

ACTS AND PRACTICES

10. In the course of interstate commerce, Union Carbide, a leading company in each relevant line of commerce alleged herein, has engaged and is engaging in acts and practices which may foreclose competition in the sale of relevant industrial gases to distributors. Among the acts and practices in which Union Carbide has engaged and is continuing to engage, in the course of interstate commerce, are the following:

(a) Requiring distributors, pursuant to a contract, agreement or understanding, to purchase from Union Carbide their total requirements of each of the relevant industrial gases;

(b) Requiring distributors to purchase their total requirements of the relevant industrial gases from Union Carbide as a condition to their purchasing any relevant industrial gas from Union Carbide;

(c) Requiring distributors to purchase their total requirements of the relevant industrial gases from Union Carbide as a condition to their purchasing welding products from Union Carbide.

(d) Leasing or otherwise making available to customers of distributors who have ceased purchasing one or more Union Carbide industrial gases, industrial gas cylinders at rates set for the purpose of destroying a competitor or eliminating competition.

EFFECTS

11. The acts and practices identified in Paragraph 10 have or may have the following effects among others:

(a) Substantially lessening competition for the sale of relevant industrial gases to distributors;

(b) Substantially lessening competition for the sale of relevant industrial gases to consumers;

(c) Increasing entry barriers into each line of commerce alleged herein;

(d) Depriving distributors of the opportunity of competing for sales of relevant industrial gases to certain classes of customers.

VIOLATIONS

12. The acts and practices alleged herein constitute tying arrangements, exclusive dealing arrangements or total requirements

contracts in violation of Section 3 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended.

13. The acts and practices alleged herein constitute unfair methods of competition or unfair acts and practices by Union Carbide in violation of Section 5 of the Federal Trade Commission Act, as amended.

COUNT II

14. The charges of Paragraphs 1 through 6 are incorporated by reference herein as if set forth verbatim.

PLAN AND PATTERN OF ACQUISITIONS

15. Since 1969, Union Carbide, pursuant to a plan or plans, has acquired an interest of 50 percent or more in at least 22 distributors. The total dollar amount expended for these acquisitions was approximately $18 million.

16. The sales of the acquired distributors for the year prior to their acquisition ranged from $309,000 to $4,835,000.

17. As part of its continuing plan of acquisitions, Union Carbide expects to acquire additional distributors within the next five years.

18. At all times relevant herein, each of the acquired distributors was engaged in the purchase or sale of products in interstate commerce, was engaged in commerce as commerce is defined in the Clayton Act, as amended, and operated a business in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

TRADE AND COMMERCE

19. The manufacture and sale of gas welding apparatus constitutes a relevant line of commerce. Union Carbide accounted for a substantial share of the domestic gas welding apparatus market in 1972.

20. The manufacture and sale of each of the following relevant industrial gases: acetylene, argon, helium, hydrogen, nitrogen and oxygen, constitutes a relevant line of commerce.

21. During 1972, there were substantial sales by Union Carbide of acetylene, argon, helium, hydrogen, nitrogen and oxygen to distributors. Union Carbide is one of the major sellers of these six gases to distributors.

22. The United States and certain sections thereof constitute geographic markets or sections of the country for each relevant line of commerce.

23. Barriers to entry are high for a new distributor of relevant industrial gases and gas welding apparatus.

24. Barriers to entry are high for a new supplier of relevant industrial gases and gas welding apparatus.

25. The purchases by those distributors in which Union Carbide has acquired an interest are and have been substantial in each relevant line of commerce.

EFFECTS OF THE ACQUISITIONS AND THE PLAN AND PATTERN OF ACQUISITIONS

26. The effect of Union Carbide's acquisitions of stock or assets of the distributors described in Paragraph 15 individually and collectively may be substantially to lessen competition or to tend to create a monopoly in the sale of relevant industrial gases to distributors and the manufacture and sale of gas welding apparatus in the United States and certain sections thereof; and the effects arising from the past and planned future acquisitions of distributors may be unreasonably to restrain trade in the sale of relevant industrial gases to distributors and the manufacture and sale of gas welding apparatus in the United States and certain sections thereof, thus constituting an unreasonable restraint of trade, an unfair method of competition and an unfair act or practice in the following ways among others:

(a) Union Carbide's competitors have been or may be foreclosed from a substantial segment of the relevant lines of commerce;

(b) The ability of nonintegrated suppliers to compete in the relevant lines of commerce has been or may be impaired;

(c) The ability of nonintegrated distributors to compete for the sale of products in the relevant lines of commerce has been or may be impaired;

(d) Barriers to entry into the sale of relevant industrial gases to distributors and the manufacture and sale of gas welding apparatus have been raised;

(e) Barriers to entry into the distribution of relevant industrial gases by potential distributors have been raised;

(f) A trend toward vertical integration between such suppliers of relevant industrial gases and gas welding apparatus and distributors of those products may be accelerated;

(g) A dangerous probability has been created that, if not curtailed, the acquisition will enable Union Carbide to enhance its position in the relevant lines of commerce;

(h) Union Carbide has been eliminated as a potential entrant through internal expansion into the retail sale of relevant industrial

gases and gas welding products in the geographic areas where it acquired an interest in distributors.

VIOLATIONS

27. Union Carbide's acquisition of at least twenty-two distributors violates Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended.

28. Union Carbide's plan pursuant to which it has acquired at least twenty-two distributors and will acquire more distributors violates Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with a violation of the Federal Trade Commission Act and the Clayton Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint issue stating its charges in that respect, and having thereupon accepted the executed agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following findings and enters the following order:

1. Respondent Union Carbide Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal place of business at 270 Park Ave., New York, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent for this purpose, and the proceeding is in the public interest.

ORDER

For the purpose of this order, the following definitions shall apply:

1. "Industrial Gases" shall mean the following gases: Oxygen, Nitrogen, Argon, Acetylene, Hydrogen and Helium.

2. "Welding Products" shall mean equipment, supplies and consumable items used to fuse or cut metals.

3. "Gas Welding Apparatus" shall mean equipment used to fuse or cut metals by means of heat produced by a gas flame.

4. "Distributor" shall mean a business firm whose primary function in the Industrial Gas and Welding Products business is the purchase of Industrial Gases and Welding Products for the purpose of resale, but shall not include any business firm whose primary function in the resale of Industrial Gases and Welding Products is the distribution of Industrial Gases and Welding Products to entities engaged in the plumbing, heating or air conditioning trade.

5. "Location" shall mean a bona fide sales and distribution facility operated by a Distributor as a receiving or distribution point for Industrial Gases, which facility ordinarily carries an inventory of Industrial Gases and Welding Products and is staffed with a bona fide sales force and operating and/or distribution personnel. Two or more facilities that are staffed by common sales and operating and/or distribution personnel shall be deemed to comprise a single Location.

6. "Requirements" of any Distributor for any Industrial Gas at any Location shall mean such Distributor's total requirements for such Industrial Gas either delivered to such Location or delivered direct by the Distributor to using customers which are generally served by sales or distribution personnel assigned to such Location.

I

It is ordered and directed, That for a period of twenty (20) years from the date of service of this Order, respondent Union Carbide Corporation (hereinafter Union Carbide), its subsidiaries, divisions, affiliates, successors, and assigns, in connection with the distribution, offering for sale, or sale of Industrial Gases or Welding Products to Distributors in which it owns less than a majority interest, shall:

A. Not offer, renew, extend or enter into any contracts or agreements, or enforce directly or indirectly those provisions of any contract or agreement, which require any Distributor:

1. to purchase from Union Carbide all or any part of its requirements of any Industrial Gas unless (a) the initial term of such contract or agreement is one year or less, and (b) such contract or agreement may be terminated by either party effective on any anniversary date upon written notice given some minimum period in advance of such date as set forth in such contract, such minimum period to be not more than ninety (90) days; or

2. to purchase from Union Carbide all or any part of its requirements of any Industrial Gas at one or more Locations as a condition to being permitted to purchase from Union Carbide such Industrial Gas at another Location; or

3. to purchase from Union Carbide all or any part of its requirements of any Industrial Gas at any Location as a condition to being permitted to purchase from Union Carbide any other Industrial Gas at the same or any other Location; or

4. to purchase from Union Carbide all or any part of its requirements of any Industrial Gas at any Location as a condition to being permitted to purchase from Union Carbide any Welding Products.

B. Not refuse to sell, subject to paragraph A1 above, Industrial Gases or Welding Products to a Union Carbide Distributor because that Distributor refuses (1) to purchase all or a designated part of its requirements of Industrial Gases from Union Carbide; or (2) to purchase from Union Carbide all or any part of its requirements of Industrial Gases at more than one of its Locations.

II

It is further ordered, That for a period of twenty (20) years from the date of service of this Order, Union Carbide shall not, either directly or indirectly through subsidiaries in which Union Carbide owns a majority interest, (i) lease or otherwise make available to customers of any Distributor who has ceased purchasing one or more Union Carbide Industrial Gases within the preceding two years, Industrial Gas cylinders at rental or demurrage rates set for the purpose of destroying a competitor or eliminating competition, or (ii) lease or otherwise make available to competitors of any Distributor who has ceased purchasing one or more Union Carbide Industrial Gases within the preceding two years, Industrial Gas cylinders at rental or demurrage rates lower than the standard rental or demurrage rate for such cylinders then in effect for Union Carbide Industrial Gas Distributors, for the purpose of destroying a competitor or eliminating competition; *provided, however,* that if either a standard cylinder

rental rate schedule to Union Carbide Industrial Gas Distributors or a standard cylinder demurrage rate schedule to such Distributors, but not both, is in effect, then, for the purpose of this Part II, one shall be deemed to be equivalent to the other on the basis of the revenue that would be generated by a single cylinder during a two-month period of continuous usage, rounded to the nearest cent; and *provided, further,* that for the purpose of this Part II, a standard cylinder rental or demurrage rate shall be a rate which is available to all Union Carbide Industrial Gas Distributors; and *provided, further,* that the purpose of destroying a competitor or eliminating competition must be established by proof of intent on the part of Union Carbide to destroy the Industrial Gas business of, or eliminate as a competitor, a Distributor who has ceased to distribute one or more Union Carbide Industrial Gases; and evidence that Union Carbide has engaged in price competition with such Distributor or that Union Carbide intends to seek or obtain the trade of particular customers then being served by such Distributor shall not, by itself, be sufficient to establish such intent; and *provided, further,* that Union Carbide may set rental or demurrage rates for customers or competitors of such Distributor lower than those in effect for Union Carbide Industrial Gas Distributors in good faith response to competitive conditions in the area served by such Distributor; and *provided still further,* that Union Carbide shall have all defenses which would be available in law, including, but not limited to, the defenses of meeting competition and cost justification.

III

A. *It is further ordered,* That for a period of ten (10) years from the date of service of this order, Union Carbide shall not without prior approval of the Commission, except as otherwise provided in paragraph B of this Part III, acquire, directly or indirectly, the whole or any part of the assets, stock, share capital of, or other equity interest in, any Distributor of Industrial Gases and/or Gas Welding Apparatus.

B. No prior approval shall be required under this order for any acquisition by Union Carbide of any assets, stock, share capital of, or other equity interest in, any Distributor of Industrial Gases or Gas Welding Apparatus if such acquisition meets any of the following standards:

1. the acquisition involves only a change in the equity interest of Union Carbide in a Distributor in which Union Carbide already holds an equity interest; or

2. except to the extent such acquisition is covered by clause 3

of this paragraph B, the consummation of the acquisition does not result in Union Carbide owning an equity interest, obtained by acquisition, in Distributors to whom, in the calendar year prior to the calendar year in which such acquisition is consummated, Union Carbide sold in excess of 16 percent of its total sales of Industrial Gases or 16 percent of its total sales of Gas Welding Apparatus sold in such year to all acquired and independent Distributors; *provided, however,* that no acquisition of a Distributor shall be exempt from prior approval under this clause 2 unless the Distributor to be acquired purchased from Union Carbide more than 50 percent of its total purchases of industrial gases in the calendar year prior to the calendar year in which such acquisition is consummated; or

3. the acquisition is not covered by clause 2 of this paragraph B, but within twelve (12) months prior to the consummation of such acquisition Union Carbide has divested absolutely and in good faith by sale or spin-off its equity interests in one or more Distributors the aggregate dollar value of whose purchases of Industrial Gases and Gas Welding Apparatus, respectively, in the calendar year in which such acquisition is consummated was equal to or in excess of the aggregate dollar value of purchases of Industrial Gases and Gas Welding Apparatus, respectively, in such prior calendar year, by the Distributor so acquired; *provided, however,* that, to the extent that any purchases by a divested Distributor are utilized by Union Carbide in a determination that an acquisition falls within the provisions of clause 2 or 3 of this paragraph B, the purchases so utilized shall not again be utilized by Union Carbide in determining whether any other acquisition falls within the provisions of this clause 3; or

4. the transaction involves only (a) the purchase of products from a Distributor in the normal course of business, or (b) the purchase of fixed assets from an independent Distributor in a transaction in which the Distributor will continue thereafter to carry on its function as an independent Distributor in which Union Carbide has no equity interest; or

5. but for the acquisition by Union Carbide, the Distributor would have ceased business operations as an Industrial Gas Distributor as a result either of its financial condition or of the death or physical or mental incapacity of essential management personnel.

C. During the period that this Part III is in effect, Union Carbide shall advise the Commission, prior to consummation thereof, of each acquisition of the type described in paragraph A of this Part III as to

which prior approval is not required because of the provisions of paragraph B2 or B3 of this Part III.

D. During the period that this Part III is in effect, Union Carbide shall, within ninety (90) days from the date of each acquisition described in paragraph B5 of this Part III, provide information sufficient for the Commission to determine whether, but for the acquisition by Union Carbide, the Distributor would have ceased business operations as an Industrial Gas Distributor as a result either of its financial condition or of the death or physical or mental incapacity of essential management personnel.

IV

It is further ordered, That if, during the ten (10) year period beginning on the date of service of this order, any Distributor of Industrial Gases and/or Gas Welding Apparatus in which Union Carbide holds an equity interest acquires, without the prior approval of the Commission to the extent such approval would be required under Part III of this order if such acquisition were made directly or indirectly by Union Carbide, the whole or any part of the assets, stock, or share capital of, or other equity interest in, any Distributor of Industrial Gases and/or Gas Welding Apparatus, then Union Carbide shall within six (6) months thereafter divest absolutely and in good faith by sale or spin-off its equity interests in one or more Distributors, the aggregate dollar value of whose purchases of Industrial Gases and Gas Welding Apparatus, respectively, in the prior calendar year was equal to or in excess of the aggregate dollar value of purchases of Industrial Gases and Gas Welding Apparatus, respectively, in such prior calendar year by the Distributor so acquired; *provided, however,* that to the extent that any purchases by a divested Distributor are utilized by Union Carbide in determining compliance with the divestiture provisions of this Part IV, the purchases so utilized shall not again be utilized by Union Carbide in determining whether any other acquisition falls within the provisions of Paragraph III B3 of this order.

V

It is further ordered:

A. That if the Commission does not seek against Airco, Inc., an order to cease and desist from engaging in practices set forth in paragraph 10 of the complaint here attached, similar to that provided in Parts I and II of this order, in a complaint arising out of the investigation conducted under FTC File No. 751 0010 and issued not

later than one year from the effective date of this order, then Parts I and II of this order shall be of no further force and effect after such anniversary date.

B. That if the Commission issues on or before the first anniversary of the effective date of this order a complaint against Airco, Inc. arising out of the investigation conducted under FTC File No. 751 0010 and at any time after issuance such complaint is dismissed on the motion of, or without objection by, the Commission staff, then Parts I and II of this order shall be of no further force and effect after the effective date of such dismissal.

C. That if a consent order is entered against Airco, Inc. in settlement of a proceeding arising out of the investigation conducted under FTC File No. 751 0010 which contains any provisions that differ from any provisions of Part I or II of this order, then Union Carbide may apply to the Commission for modification of, or relief from, any such different provisions in this order, and upon such application the Commission shall grant such modification or relief in the provisions covered by such application as are necessary to conform such provisions in this order with the corresponding provisions of such Airco, Inc. consent order.

VI

It is further ordered, That Union Carbide shall within twenty-one (21) days after service upon it of this order forward a copy of this order and the complaint issued herein along with a copy of the attached letter (Attachment A) on respondent's official company stationery and signed by a responsible official of Union Carbide to Distributors of Union Carbide Industrial Gases and/or Gas Welding Apparatus.

VII

It is further ordered, That Union Carbide notify the Commission at least thirty (30) days prior to any proposed changes in corporate structure of Union Carbide such as dissolution, assignment or sale resulting in the emergence of a successor corporation, which may affect compliance obligations arising out of the order.

VIII

It is further ordered, That Union Carbide shall within sixty (60) days after service upon it of this order file with the Commission a report in writing setting forth in detail the manner in which it has complied with this order, and shall file such other reports as may

from time to time be required to assure compliance with the terms and conditions of this order.

ATTACHMENT A

(Official Stationery of Union Carbide Corporation)

Dear Date

Please be advised that Union Carbide Corporation has entered into a Consent Order with the Federal Trade Commission which obligates the company not to impose certain restrictions upon Industrial Gases* and Welding Products* Distributors* or to engage in certain other practices. A copy of the Consent Order is enclosed herewith.

Union Carbide has agreed not to enforce those provisions of any existing contract for the purchase of Industrial Gases or Welding Products which are inconsistent with Paragraph IA of this Order. Thus, you will not be required to purchase from Union Carbide any part of your requirements of any Industrial Gas at any Location* as a condition to being permitted to purchase from Union Carbide the same Industrial Gas at another Location or any other Industrial Gas at the same or any other Location or any Welding Products. Union Carbide has agreed that you may terminate any existing contract for Industrial Gases or Welding Products either in its entirety, or as to any individual Industrial Gas at any Location, upon ninety (90) days prior written notice to Union Carbide.

Union Carbide will submit to you new contracts consistent with the Consent Order discussed above no later than six (6) months from the date of service of the Order. These new contracts will replace all current contracts no later than the first anniversary of the date of service of the Order and notice of termination will be given by Union Carbide not later than ninety (90) days prior to that date. If, at any earlier date, you choose to terminate any existing contract, either in its entirety or as to a particular Industrial Gas at a particular Location, you will be offered this new contract in its place. In any event, these new contracts will replace all current contracts for Industrial Gases not later than the first anniversary of the date of service of the Order.

Please note that, pursuant to the terms of Part V of the Order, certain provisions of the Order shall no longer be effective if the Commission does not issue, or consents, on the motion of, or without objection by, the Commission staff, to the dismissal of, a complaint against Airco, Inc. Further, if the Commission consents to an order with Airco which differs from this Order, Union Carbide may obtain a corresponding modification of this Order. If any such eventualities occur, we will notify you by letter of the applicable changes.

If, in the future, you believe that any of the terms of the enclosed Consent Order have been violated, you may report the details in writing to:

Federal Trade Commission Bureau of Competition Washington, D.C. 20580

We welcome the opportunity to do business with you on terms which are in accordance with the letter and spirit of the Federal Trade Commission Order.

Very truly yours, (Name and Title of Responsible Official) Union Carbide Corporation

Enclosure

* The terms "Industrial Gases," "Welding Products," "Distributor" and "Location" are defined in the enclosed order.

IN THE MATTER OF

SOFT SHEEN COMPANY, INC., ET AL.

MODIFYING ORDER, IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2786. Complaint, Jan. 27, 1976 — Modifying order, Sept. 30, 1977

This order modifies a cease and desist order issued January 27, 1976, 41 FR 7939, 87 F.T.C. 164 to conform with obligations of a consent order issued against a competitive firm, by limiting substantiation requirements for safety claims in Provision I.B., and revising the third warning, pertaining to hair relaxers, in Provision III.

Appearances

For the Commission: *Sharon S. Armstrong.*

For the respondents: *John O. Nelson, Molinair, Allegretti, Newitt & Witcoff* and *Rickey J. Ament,* Chicago, Ill.

ORDER MODIFYING ORDER TO CEASE AND DESIST

On October 28, 1976, respondent Soft Sheen Co., Inc. petitioned the Commission to reopen this proceeding to modify the third warning in Provision III of the consent order issued January 28, 1976 against respondents in this matter. The third warning, which is to be made in connection with the sale and distribution of respondents' hair relaxer and which is to appear on the packaging, package inserts and the labels of the product, reads, "Do not use on bleached, dyed or tinted hair. If you have previously relaxed your hair, relax only the new growth, as described in the directions." Respondent objects to the inclusion of tinted hair in the warning.

On March 18, 1976, Soft Sheen requested by letter that the order's product coverage be limited to hair relaxers. Our request is incorporated into the October 28, 1976, petition to reopen.

Complaint counsel support the petition and recommend that the warning be modified to read:

> 3. Do not use on bleached hair. Do not use on permanently colored hair which is breaking, splitting or otherwise damaged. For hair that has been permanently colored and shows no sign of damage, use only mild strength formula.
>
> 4. If you have previously relaxed your hair, relax only the new growth, as described in the directions.

We agree that the petition should be granted. Most if not all, of the products manufactured and sold by Soft Sheen are hair care products, and a substantial portion of the firm's revenues is derived

from the sale of hair relaxers. These latter products are generally sold directly to professional beauticians. Under these circumstances, the Commission believes that modification of the order to limit the substantiation requirements for safety claims to hair care products, and for efficacy claims to hair straighteners, will serve adequately to protect the public interest. Furthermore, additional expert information provided to the Commission after issuance of the Soft Sheen order, supports revision of the warning requirement.

Finally, after entry of its order in this matter, the Commission issued a consent order [89 F.T.C. 1] against Revlon, Inc., a competitor of Soft Sheen in the sale of hair relaxers, which includes a warning and product coverage identical to the changes recommended by complaint counsel here. For these reasons, the Commission believes that it is in the public interest to grant the modification sought by Soft Sheen.

Accordingly,

It is ordered, That the proceeding be, and it hereby is, reopened.

It is further ordered, That the order to cease and desist be, and it hereby is, modified by substituting the following for the WARNING contained in Provision III of the order:

WARNING:

1. This product contains potassium hydroxide (lye). You must follow directions carefully to avoid skin and scalp burns, hair loss, and eye injury.

2. Do not use if scalp is irritated or injured.

3. Do not use on bleached hair. Do not use on permanently colored hair which is breaking, splitting, or otherwise damaged. For hair that has been permanently colored and shows no sign of damage, use only mild strength formula.

4. If you have previously relaxed your hair, relax only the new growth, as described in the directions.

5. If the relaxer causes skin or scalp irritation, rinse out immediately and neutralize with the shampoo in the kit. If irritation persists or if hair loss occurs, consult a physician.

6. If the relaxer gets into eyes, rinse immediately and consult a physician.

It is further ordered, That the order to cease and desist be, and it hereby is, modified by substituting the following Provision for I.B. of the order, and relettering the remaining paragraphs accordingly:

B. Representing, in any manner, directly or by implication, the efficacy of any hair straightening product or the ingredients therein, unless, at the time such representation is made, respondents have in

their possession a reasonable basis, consisting of competent and reliable controlled tests, to support such representation; or misrepresenting in any manner the nature of any such product or its ingredients or the effect of any such product or its ingredients on hair or skin or any other structure of the body.

C. Representing, in any manner, directly or by implication, the safety of any hair care product or the ingredients therein, unless at the time such representation is made, respondents have in their possession a reasonable basis, consisting of competent and reliable controlled tests, to support such representation.

IN THE MATTERS OF

BRISTOL-MYERS COMPANY, ET AL. - D. 8917

AMERICAN HOME PRODUCTS CORPORATION, ET AL. - D. 8918

STERLING DRUG INC., ET AL. - D. 8919

Dockets 8917, 8918, 8919. Interlocutory Order, Oct. 7, 1977

Denial of complaint counsel's motion for reconsideration of August 23, 1977, order denying on procedural grounds their application for review of a discovery ruling.

ORDER DENYING COMPLAINT COUNSEL'S MOTION FOR RECONSIDERATION

Complaint counsel seek reconsideration of our order of August 23, 1977, which denied on procedural grounds their application for review of a discovery ruling requiring production of two memoranda of interviews with potential witnesses. The Commission's ruling is characterized as excessively rigid and formalistic, and the underlying issue as a "controlling question" within the meaning of Section 3.23(b) of our Rules.

That our August 23 ruling represented a strict application of the terms of Section 3.23 is conceded. Interlocutory appeals in general are disfavored, as intrusions on the orderly and expeditious conduct of our adjudicative process. Interlocutory appeals from discovery rulings merit a particularly skeptical reception, because particularly suited for resolution by the administrative law judge on the scene and particularly conducive to repetitive delay. In the absence of close and decisive supervision by the administrative law judge, the discovery process in any but the simplest case can be productive of endless dispute, sincere or contrived, to the point that any eventual remedial order relates only to history. Further, any perception on the part of our administrative law judges that the Commission will exercise broadly its undisputed authority to review interlocutory rulings will tend toward the atrophy of their sense of responsibility for the impact of their rulings on the proceedings before them.

These considerations, as noted, apply to interlocutory review generally and to review of discovery rulings particularly. Concededly, however, the Commission has by its Rule Section 3.23(a) afforded a special status to appeals from rulings which, as here, require the disclosure of Commission records. This provision must nonetheless not be understood as a signal that such appeals are favored, but as a

recognition of the Commission's duties under its organic Act to maintain a special oversight capacity, exercisable when circumstances warrant, with regard to release of its records. See 15 U.S.C. 46(f), 50.

We find here no showing that the special concerns which Section 3.23(a) reflects are imperiled. Nor is any sufficient basis demonstrated for the invocation of Section 3.23(b) to supersede the informed discretion of the administrative law judge. If, as complaint counsel urge, the necessity for such rulings is likely to recur with some frequency as the trial progresses, we deem it all the more advisable that they be made by the officer charged with its day-to-day conduct, absent a clear showing of substantial prejudice to one of the parties.

It is therefore ordered, That the motion be, and hereby is, denied.

IN THE MATTER OF

HERBERT R. GIBSON, SR., ET AL.

Docket 9016. Interlocutory Order, Oct. 12, 1977

Denial of respondents' motion to dismiss for lack of public interest.

ORDER GRANTING RESPONDENTS' APPEAL OF ADMINISTRATIVE LAW JUDGE'S REFUSAL TO CERTIFY MOTION TO DISMISS FOR LACK OF PUBLIC INTEREST, AND DENYING AFORESAID MOTION

On June 10, 1977 respondents moved (1) for summary decision on Counts I and III of the complaint, (2) for removal of Count II from adjudication because they agreed to accept complaint counsel's suggested consent order as to that count, and (3) in the alternative, for certification to the Commission of their request for dismissal for lack of public interest. On the 19th and 20th of July 1977, the law judge denied all three motions.

On July 26, 1977 respondents filed an application for an interlocutory appeal from the order denying their motions for summary decision and for certification of the public interest question. On August 10, 1977, the law judge entered an order denying authorization to file an interlocutory appeal of the denial of their motion for summary decision and granting authorization to file an interlocutory appeal of the denial of their request for certification of the motion to dismiss.

The threshold question, then, is whether the motion to dismiss for asserted lack of public interest is properly before the Commission. We conclude it is because the law judge lacks authority to rule on it.[1] It is well established that an administrative law judge lacks authority to rule on and must certify motions to dismiss for lack of public interest and other motions containing questions pertaining to the Commission's exercise of administrative discretion. *See Exxon Corp.*, Dkt. 8934, CCH Trade Reg. Rep. ¶21,299 (April 19, 1977); *Amrep Corporation*, 87 F.T.C. 283 (1976); *Crush International Ltd.*, 80 F.T.C. 1023 (1972); *Philip Morris, Inc.*, 79 F.T.C. 1023 (1971); *First Buckingham Community, Inc.*, 73 F.T.C. 938 (1968); and *Suburban Propane Gas Corporation*, 71 F.T.C. 1695 (1967).[2]

The asserted facts as to the lack of public interest on which the motion rests are essentially the same as those that formed the basis for respondents' June 10, 1977 motion for summary decision. The

[1] Commission Rules, Section 3.22(a), provide that "[a]ny motion upon which the Administrative Law Judge has no authority to rule shall be certified by him to the Commission with his recommendation."

[2] Respondents were not prejudiced by the law judge's July refusal to certify their June motion to dismiss. The matter is now before the Commission for *de novo* consideration and determination. *Suburban Propane, supra* at 1697.

respondents argued that H. R. Gibson, Sr. had no interest in any retailer, that no monies received by the Gibson Trade Show were paid to any retailer, and that the trade show was open to any retailer. The law judge in ruling on that motion, explained that respondents' assertions involved factual issues that were in dispute, the resolution of which would require a hearing. With the proof in this posture, the motion to dismiss is no riper for decision than was the motion for summary decision. Accordingly,

It is ordered, That the aforesaid motion to dismiss for lack of public interest be, and it hereby is denied.

IN THE MATTER OF

FRANKART DISTRIBUTORS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2904. Complaint, Oct. 13, 1977 — Decision, Oct. 13, 1977

This consent order, among other things, requires a New Rochelle, N.Y. furniture dealer and its affiliates to cease using the terms "carved" or "detailed carving" or any other similar terms to describe furniture which has not been cut or carved into shape. Further, the order requires the firms to make clear and conspicuous disclosures regarding the composition or construction of their furniture, both in their advertising and on the furniture displayed in their showrooms.

Appearances

For the Commission: *Alan F. Rubinstein.*

For the respondents: *John A. Occhiogrosso,* New Hyde Park, N.Y.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Frankart Distributors, Inc., a corporation; Frankart Flushing, Inc., a corporation; Frankart-Fordham, Inc., a corporation; Frankart Westchester, Inc., a corporation; Frankart-New Rochelle, Inc., a corporation; Frankart Paramus, Inc., a corporation; Frankart Jamaica, Inc., a corporation; Frankart Kings, Inc., a corporation; Mallary, Inc., a corporation, doing business under that name and as Frankart-Grand Concourse, and Bernard Frankel, individually and as an officer of said corporations, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Frankart Distributors, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 543 Main St., New Rochelle, New York.

Respondent Frankart Flushing, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 37-11 Main St., Flushing, New York.

Respondent Frankart-Fordham, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 18 West Fordham Road, Bronx, New York.

Respondent Frankart Westchester, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 1088 Central Ave., Scarsdale, New York.

Respondent Frankart-New Rochelle, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 543 Main St., New Rochelle, New York.

Respondent Frankart Paramus, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at Route 4, Spring Valley Road, Paramus, New Jersey.

Respondent Frankart Jamaica, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 160–08 Jamaica Ave., Jamaica, New York.

Respondent Frankart Kings, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 1209 Kings Highway, Brooklyn, New York.

Respondent Mallary, Inc., doing business under that name and as Frankart-Grand Concourse, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 2431 Grand Concourse, Bronx, New York.

Respondent Bernard Frankel is an individual and an officer of the corporate respondents. He formulates, directs and controls the policies, acts and practices of said corporate respondents, including the acts and practices hereinafter set forth. His business address is 543 Main St., New Rochelle, New York.

PAR. 2. Respondent Frankart Distributors, Inc. is now, and for some time last past has been, engaged in the purchasing of furniture and related products for sale and distribution to the other corporate respondents named herein.

Respondents Frankart Flushing, Inc., Frankart-Fordham, Inc., Frankart Westchester, Inc., Frankart-New Rochelle, Inc., Frankart Paramus, Inc., Frankart Jamaica, Inc., Frankart Kings, Inc. and Mallary, Inc., doing business under that name and as Frankart-Grand Concourse are now, and for some time last past have been,

engaged in the advertising, offering for sale, sale and distribution of furniture and related products at retail to the public.

PAR. 3. In the course and conduct of their business as aforesaid, and at all times mentioned herein, respondent Frankart Distributors, Inc. has purchased, and continues to purchase, furniture and other merchandise from suppliers, distributors and manufacturers in states other than New York and New Jersey for the purpose of supplying said merchandise to the other corporate respondents named herein for sale at retail.

PAR. 4. In the further course and conduct of their business as aforesaid, respondents now cause and for some time last past have caused furniture and other merchandise when sold to be shipped from their places of business within the States of New York and New Jersey, to purchasers in states other than those in which said shipments originate.

PAR. 5. In the course and conduct of their business as aforesaid, respondents have caused, and now cause, the dissemination of advertisements regarding their furniture in newspapers of interstate circulation, for the purpose of inducing, and which are likely to induce, directly or indirectly, the purchase of said merchandise.

PAR. 6. By virtue of the aforesaid acts and practices, respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 7. In the course and conduct of their business, and for the purpose of inducing the sale of their furniture, respondents have made and are now making, certain statements and representations in newspaper advertisements with respect to the method by which certain of their furniture has been styled.

Typical and illustrative of said statements and representations, but not all inclusive thereof, are the following:

. . .carved. . . . . .detailed carving.

PAR. 8. By and through the use of the above-quoted statements and representations, and others of similar import and meaning but not expressly set forth herein, respondents have represented and are now representing, directly or by implication, that said advertised furniture has been styled by cutting or carving.

PAR. 9. In truth and in fact: the furniture referred to in Paragraph Eight above is not styled by cutting or carving, but is formed from plastic by the use of a mold.

Therefore, the statements and representations set forth in Para-

graphs Seven and Eight hereof were and are false, misleading and deceptive.

PAR. 10. A substantial quantity of the furniture advertised, displayed, offered for sale, or sold by respondents has the appearance of being composed of solid wood, but in fact, contains exposed surfaces of veneered construction. The fact of such veneered construction is not disclosed in respondents' advertising, on the furniture itself, or on tags or labels attached thereto. Thus, respondents have failed to disclose a material fact, which, if known to certain customers would likely affect their consideration of whether or not to respond to respondents' advertisements and to purchase merchandise being offered for sale by respondents.

The aforesaid failure to disclose said material fact has the capacity and tendency to mislead purchasers or prospective purchasers with respect to the composition and construction of the furniture sold by respondents.

Therefore, respondents' failure to disclose said material fact was, and is, unfair, misleading and deceptive.

PAR. 11. A substantial quantity of the furniture advertised, displayed, offered for sale, or sold by respondents contains exposed surfaces composed of plastic or other materials which have the appearance of wood. No clear and conspicuous disclosures are made in respondents' advertising, on the furniture itself, or on tags or labels attached thereto, that the exposed surfaces of the furniture are composed of plastic or other materials which simulate wood, nor are disclosures made that such surfaces are not wood. Thus, respondents have failed to disclose material facts, which, if known to certain customers would likely affect their consideration of whether or not to respond to respondents' advertisements and to purchase merchanidse being offered for sale by respondents.

The aforesaid failure to disclose said material facts, separately and in connection with the representations set forth in Paragraphs Seven and Eight hereof, has the capacity and tendency to mislead purchasers or prospective purchasers with respect to the durability, composition or construction of the furniture sold by respondents.

Therefore, respondents' failure to disclose said material facts was, and is, unfair, misleading and deceptive.

PAR. 12. In the course and conduct of their business as aforesaid, and at all times mentioned herein, respondents have been, and now are, in substantial competition, in or affecting commerce, with corporations, firms and individuals engaged in the sale of merchandise of the same general kind and nature as sold by respondents.

PAR. 13. The use by respondents of the aforesaid false, misleading,

deceptive and unfair statements, representations, acts and practices, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and complete, and into the purchase of substantial quantities of products sold by respondents by reason of said erroneous and mistaken belief.

PAR. 14. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in or affecting commerce and unfair and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act, as amended; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed by Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Frankart Distributors, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 543 Main St., New Rochelle, New York.

Respondent Frankart Flushing, Inc. is a corporation organized,

existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 37-11 Main St., Flushing, New York.

Respondent Frankart-Fordham, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 18 West Fordham Road, Bronx, New York.

Respondent Frankart Westchester, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 1088 Central Ave., Scarsdale, New York.

Respondent Frankart-New Rochelle, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York,with its principal office and place of business located at 543 Main St., New Rochelle, New York.

Respondent Frankart Paramus, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at Route 4, Spring Valley Road, Paramus, New Jersey.

Respondent Frankart Jamaica, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 160-08 Jamaica Ave., Jamaica, New York.

Respondent Frankart Kings, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 1209 Kings Highway, Brooklyn, New York.

Respondent Mallary, Inc., doing business under that name and as Frankart-Grand Concourse, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 2431 Grand Concourse, Bronx, New York.

Respondent Bernard Frankel is an individual and an officer of the corporate respondents. He formulates, directs and controls the policies, acts and practices of said corporate respondents, including the acts and practices hereinafter set forth. His business address is 543 Main St., New Rochelle, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Frankart Distributors, Inc., Fran-

kart Flushing, Inc., Frankart-Fordham, Inc., Frankart Westchester, Inc., Frankart-New Rochelle, Inc., Frankart Paramus, Inc., Frankart Jamaica, Inc., Frankart Kings, Inc., corporations, Mallary, Inc., a corporation, doing business under that name and as Frankart-Grand Concourse, or under any other name or names, their successors and assigns, and their officers, and Bernard Frankel, individually and as an officer of said corporations, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or any other device, in connection with the advertising, displaying, offering for sale, sale and distribution of furniture, or any other products, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Using the terms "carved" or "detailed carving" or any other terms of similar import and meaning, to describe any furniture or part thereof that has not been cut or carved into shape.

FOR PURPOSES OF THIS ORDER, "EXPOSED SURFACES" ARE DEFINED AS THOSE PARTS AND SURFACES EXPOSED TO VIEW WHEN FURNITURE IS PLACED IN THE GENERALLY ACCEPTED POSITION FOR USE.

2. Failing to clearly and conspicuously disclose that furniture having the appearance of solid wood, but containing exposed surfaces of veneered construction, contains such veneered construction.

3. Failing to clearly and conspicuously disclose that furniture containing exposed surfaces composed in whole or in part of plastic or other materials which have the appearance of wood, contains such plastic or other materials, or that the exposed surfaces are not wood.

4. Failing to disclose either the true composition or construction of furniture or its parts, or that material is not what it appears to be, whenever any statement, representation or depiction is used in advertising, which may otherwise be misleading as to the true composition or construction of such furniture or its parts without such disclosure. Such disclosures shall be made clearly and conspicuously and in close conjunction with any statements, representations or depictions used.

5. Failing to clearly and conspicuously disclose, on the furniture itself, or on tags or labels attached to such furniture in a manner so as not to be easily removed, either the true composition or construction of furniture or its parts, or that material is not what it appears to be, whenever the appearance of such furniture or its parts may be misleading as to its true composition or construction without such disclosure.

It is further ordered, That respondents deliver a copy of this order

to all operating divisions and to all present and future personnel of respondents responsible for any aspect of preparation, creation, or placing of advertising, and to all present and future personnel of respondents responsible for the sale or offering for sale of all products covered by this order, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That no provision of this order shall be construed in any way to annul, invalidate, repeal, terminate, modify or exempt respondents from complying with agreements, orders or directives of any kind obtained by any other agency or act as a defense to actions instituted by municipal or state regulatory agencies. No provision of this order shall be construed to imply that any past or future conduct of respondents complies with the rules and regulations of, or the statutes administered by, the Federal Trade Commission.

It is further ordered, That respondents shall maintain for at least a one (1) year period following the effective date of this order, copies of all advertisements, including newspaper, radio and television advertisements, direct mail and in-store solicitation literature, and any other promotional material utilized in the advertising, promotion or sale of all products covered by this order.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation or corporations, the creation or dissolution of subsidiaries, or any other change in the corporations which may affect compliance obligations arising out of this order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of each change in business or employment status, which includes discontinuance of his present business or employment and each affiliation with a new business or employment, for ten (10) years following the effective date of this order. Such notice shall include respondent's current business address and a description of the business or employment in which he is engaged as well as a description of his duties and responsibilities. The expiration of the notice provision of this paragraph shall not affect any other obligations arising under this order.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

JETMA TECHNICAL INSTITUTE, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 9061. Complaint, Oct. 28, 1975 — Decision, Oct. 19, 1977

This consent order, among other things, requires a San Francisco, Calif. seller of correspondence training courses for gas turbine engine mechanics, and technical illustrators, to cease misrepresenting the need, demand, or potential earnings of their graduates; failing to furnish prospective enrollees material disclosures regarding the employment rate, drop-out rate, and financial success of recent students. Further, respondents are required to furnish prospective students with a ten-day cooling-off period within which to cancel their contracts; to maintain for a two-year period files of inquiries and complaints relating to prohibited acts and practices; and to institute a surveillance program designed to ensure that their representatives comply with the terms of the order.

Appearances

For the Commission: *John M. Porter* and *Seela Lewis,* Consumer Protection Specialist.

For the respondents: *Daniel C. Smith, Arent, Fox, Kintner, Plotkin & Kahn,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Jetma Technical Institute, a corporation, and Fred Lee, Jr. and Anna H. Lee, individually and as officers of said corporation, hereinafter sometimes referred to as "respondents," have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Jetma Technical Institute, hereinafter referred to as "Jetma," is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 103 South Airport Boulevard, South San Francisco, California.

Respondents Fred Lee, Jr. and Anna H. Lee are the principal officers of Jetma. They formulate, direct and control the policies, acts and practices of the corporate respondent, including the acts and

practices hereinafter set forth. Their business address is the same as that of respondent Jetma.

The aforementioned respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of training courses purporting to prepare graduates thereof for employment as gas turbine engine mechanics or technical illustrators. Said courses, when pursued to completion, consist of a series of correspondence lessons, with an optional two-week in-residence training program for the gas turbine mechanics course.

PAR. 3. In the course and conduct of their aforesaid business, respondents have disseminated, and caused the dissemination of, certain advertisements concerning the training courses by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, commercial announcements on television transmitted across state lines, and by means of brochures, pamphlets and other promotional materials disseminated through the United States mail, for the purpose of obtaining leads or prospects for the sale of such training courses, and for the purpose or inducing the purchase of such training courses.

Respondents, from their principal place of business located in California, utilize the services of sales representatives and cause said sales representatives to visit prospective purchasers located in various other states who respond to the respondents' advertisements and commercial announcements for the purpose of inducing the purchase of such training courses by such prospective purchasers.

Respondents transmit and receive, and cause to be transmitted and received, in the course of advertising, offering for sale, sale and distribution of said training courses, advertising and promotional materials, sales contracts, invoices, billing statements, checks, monies and other business papers and documents, to and from the principal place of business operated by the respondents located as aforesaid and to prospective purchasers and purchasers thereof, located in various other States of the United States. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said training courses in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business as aforesaid, for the purpose of obtaining leads or prospects for the sale of such training courses, and for the purpose of inducing the purchase of such

training courses, respondents have made numerous statements and representations in television commercials, advertising brochures and other printed materials concerning the alleged large and growing demand for graduates of Jetma's gas turbine engine mechanics course; the high salaries available to them; the ease with which graduates are placed in positions for which they are trained; and the smog-free characteristics of the gas turbine engine.

In the further course and conduct of their business as aforesaid, respondents cause persons who respond to their advertisements and television commercials to be visited by respondents' sales representatives in the homes of such persons.

For the purpose of inducing the sale of respondents' training courses, such sales representatives make to prospective purchasers many statements and representations, directly or by implication, regarding the nature of the courses and services offered by the respondents, the job opportunities for graduates of respondents' course in gas turbine engine mechanics, and the value of the gas turbine engine as a smog-free alternative to engines which emit pollutants. Said statements and representations are made both orally by means of a formal sales manual and presentation, and by means of brochures or other printed materials displayed by the sales representatives to prospective purchasers and furnished to broadcast media.

Typical and illustrative, but not all inclusive of the representations in these advertisements and oral statements are the following:

Look into your opportunities as a turbine technician.

As the new anti-smog laws make present day noisy-smoky engines illegal—yes, illegal—in trucks, buses, industrial plants, even automobiles—the pressure is on to convert to other power plants. Already new gas turbine engines are rolling off assembly lines in pilot production and the pressure is on to train technicians to fix these engines, service them in shops and on the road. [television advertisement]

* * * * * * *

Do you want a challenging career with an expanding future? [television advertisement]

* * * * * * *

Here it is. . .the end of smog. . .the beginning for men who want to earn good money doing work they can be proud of. You've read what's happening, buses, big trucking companies getting ready to switch over. Those big, noisy engines that don't meet requirements will be obsolete ". . . That's the law"

Already the smog free turbines are rolling off the assembly lines in Detroit. Now

the rush is on to find trained people to help build those engines, service them, and fix them in shops and on the road. [television advertisement]

We'll turn you into a high-paid technician for the engine of the future. The gas turbine.

* * * * * * *

The field of [Jet Engine/gas turbine maintenance] offers excellent starting pay. . . [direct mail advertisement]

* * * * * * *

In a few short months you can be ready to step into the future. Jetma can show you the way as it has many thousands now employed in high paying jobs. [direct mail advertisement].

PAR. 5. By the use of the above-quoted statements, and others of similar import and meaning respondents have represented or implied that:

1. There is now or soon will be a need for a substantial number of graduates of Jetma's gas turbine engine mechanics course.

2. Graduates of Jetma's gas turbine mechanics course receive high salaries as gas turbine mechanics.

3. The gas turbine engine does not emit smog-producing pollutants.

PAR. 6. In truth and in fact:

1. There is not now nor will there soon be a need for a substantial number of graduates of Jetma's gas turbine engine mechanics course.

2. Few, if any graduates of Jetma's gas turbine mechanics course receive high salaries as gas turbine mechanics.

3. The gas turbine engine does emit smog-producing pollutants.

Therefore, the statements and representations set forth in Paragraphs Four and Five were, and are, false, misleading, unfair or deceptive acts or practices.

PAR. 7. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have offered, and are now offering, for sale training courses purporting to prepare purchasers thereof for employment as gas turbine mechanics and have made representations concerning job availability without disclosing in advertising or through their sales representatives such material facts as would indicate the possibility of securing future employment upon completion of the training courses, and the nature of such employment, including such statistics as: (1) the recent percentage of persons who have completed the training courses who were able to obtain the employment for which they were trained; (2) the employers that hired any such persons; (3) the initial salary any such

persons received; and (4) the percentage of recent enrollees of each school for each course offered that have failed to complete their course of instruction. Thus, respondents have failed to disclose material facts which, if known to certain consumers, would be likely to affect their consideration of whether or not to purchase such training courses. Therefore, the aforesaid acts and practices were, and are, false, misleading, deceptive or unfair acts or practices.

PAR. 8. In the further course and conduct of their business and in the furtherance of their purpose of inducing prospective enrollees to execute enrollment contracts for their training course, respondents and their employees, sales representatives, and representatives have engaged in the following additional unfair, false, misleading and deceptive acts and practices:

In a substantial number of instances, through the use of the false, misleading and deceptive statements, representations and practices set forth in Paragraphs Four through Seven, respondents or their representatives have induced prospective enrollees into executing enrollment contracts upon initial contact without affording the enrollee sufficient time to carefully consider the purchase of the training course and the consequences thereof. Thereafter, many such enrollees fail to complete the course.

PAR. 9. Respondents have been and are now failing to disclose material facts while using the aforesaid unfair, false, misleading or deceptive acts and practices, to induce persons to pay or contract to pay over to them substantial sums of money to purchase or pay for courses of instruction which were of little use or value to said persons for purposes of obtaining future employment in the jobs for which they were purportedly providing training. Respondents have received the said sums and have failed to offer refunds and have failed to refund such sums to, or to rescind such contractual obligations of, substantial numbers of enrollees and participants in such training courses who were unable to secure employment in the positions and fields for which they have been purportedly trained by respondents.

The use by respondents of the aforesaid acts and practices, their continued retention of said sums and their continued failure to rescind such contractual obligations of their customers, as aforesaid, are unfair acts or practices.

PAR. 10. By and through the use of the aforesaid acts and practices, respondents place in the hands of others the means and instrumentalities by and through which they may mislead and deceive the public in the manner and as to the things hereinabove alleged.

PAR. 11. In the course and conduct of their business, and at all times mentioned herein respondents have been, and are now, in

substantial competition, in or affecting commerce, with corporations, firms, and individuals engaged in the sale of training courses covering the same or similar subjects.

PAR. 12. The use by respondents of the aforesaid false, misleading, unfair or deceptive statements, representations, acts and practices and their failure to disclose the material facts as aforesaid has had, and now has, the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and complete, and to induce a substantial number thereof to purchase respondents' training courses by reason of said erroneous and mistaken belief.

PAR. 13. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and respondents' competitors and constituted, and now constitute, unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having issued its complaint in this proceeding on October 28, 1975, charging respondents named in the caption hereof with violations of the Federal Trade Commission Act; and

The Commission having withdrawn the matter from adjudication for the purpose of negotiating a settlement by the entry of a consent order; and

The respondents and counsel for the Commission having executed an agreement containing a consent order, an admission by respondents of all jurisdictional facts set forth in the aforesaid complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the agreement and having accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission makes the following jurisdictional findings, and enters the following order:

1. The agreement herein, by and between Jetma Technical Institute, a corporation, by its duly authorized officers, and Fred Lee, Jr. and Anna H. Lee, individually and as officers of said corporation, respondents in a proceeding initiated by the Federal Trade Commission through the issuance of its complaint on October 28, 1975, and their attorney, and counsel for the Federal Trade Commission, is

entered into in accordance with the Commission's Rule governing consent order procedure.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Jetma Technical Institute, a corporation, its successors and assigns, and its officers, and Fred Lee, Jr. and Anna H. Lee, individually and as officers of said corporation, and respondents' officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with advertising, offering for sale, sale, or distribution of courses of study, training or instruction in the field of gas turbine mechanics or any other subject, trade or vocation, or of any other product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing in any manner, directly or by implication, that there is or will be any need or demand for respondents' graduates in positions for which such graduates are purportedly trained, except as hereinafter provided in Paragraph 4 of this order.

2. Representing in any manner, directly or by implication, that respondents' graduates will or may earn any specified amount of money, or otherwise representing by any means the prospective earnings of such persons without clearly and conspicuously disclosing the employment salary range of respondents' graduates computed as prescribed in Paragraph 4 of the order.

3. Representing in any manner, directly or by implication, that the gas turbine engine does not emit smog-producing pollutants.

4. Failing to disclose, in writing, clearly and conspicuously, prior to the signing of any contract, to any prospective student of any course of instruction offered by respondents, the following information in the format prescribed in Appendix B with the title "IMPORTANT INFORMATION" printed in 10 point boldface type across the top of the form and for the Base Period described in Appendix A:

(1) The total number of students; the number and percentage of students who have failed to complete their course of instruction, such percentage to be computed separately for each course of instruction offered by respondents at each school, location or facility;

(2) The number and percentage of students who graduated, such percentage to be computed separately for each course of instruction;

(3) The number of graduates employed in a position for which the

course trained them and the employment placement percentages based on all students and graduates; such numbers and percentages to be computed separately for each course of instruction offered by respondents at each school, location or facility;

(4) The employment salary range of respondents' graduates as to the same graduates used to compute the placement percentage in (3) above.

Provided, however, this paragraph shall be inapplicable to any school newly established by respondents in a metropolitan area or county, whichever is larger, where they previously did not operate a school, or to any course newly introduced by respondents, until such time as the new school or course has been in operation for the base period described in Appendix A. However, during such period the following statement, and no other, shall be made in lieu of the Appendix B Disclosure Form required by this paragraph:

DISCLOSURE NOTICE

This school [or course, as the case may be] has not been in operation long enough to indicate what, if any, actual employment or salary may result upon graduation from this school [course].

5. Failing to keep adequate records, for a period of three years from the date each student discontinues training or graduates, which may be inspected by Commission staff members upon reasonable notice which substantiate the data and information required to be disclosed by Paragraph 4 of this order. Such records shall include the name, address, and telephone number of each student and, with respect to Paragraph 4 (subparagraphs 3 and 4), such records shall include:

(i) The name, address and telephone number of the firm or employer employing each graduate;

(ii) The name or title of the job position obtained;

(iii) The date on which the job position was obtained;

(iv) His/her monthly or annual salary.

6. (a) Contracting for the sale of any course of instruction in the form of a sales contract or any other agreement which does not contain in immediate proximity to the space reserved in the contract for the signature of the prospective student in boldface type of a minimum size of ten (10) points, a statement in the following form:

You, the prospective student [the buyer], may cancel this transaction at any time prior to midnight of the tenth business day after the date of this transaction. See attached notice of cancellation form for an explanation of this right.

(b) Failing to furnish each prospective student, at the time he signs the sales contract or otherwise agrees to enroll in a course of instruction offered by respondents, a complete form in duplicate, which shall be attached to the contract or agreement, and easily detachable, and which shall contain in ten (10) point boldface type the following information and statements:

NOTICE OF CANCELLATION

(enter date of transaction)

_____

(date)

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN TEN (10) BUSINESS DAYS FROM THE ABOVE DATE.

IF YOU CANCEL, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT OR SALE, AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN TEN (10) BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF YOUR CANCELLATION NOTICE, AND ANY SECURITY INTEREST ARISING OUT OF THE TRANSACTION WILL BE CANCELLED.

IF YOU CANCEL, YOU MUST MAKE AVAILABLE TO THE SELLER AT YOUR RESIDENCE, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED, ANY GOODS DELIVERED TO YOU UNDER THIS CONTRACT OR SALE; OR YOU MAY, IF YOU WISH, COMPLY WITH THE INSTRUCTIONS OF THE SELLER REGARDING THE RETURN SHIPMENT OF THE GOODS AT THE SELLER'S EXPENSE AND RISK.

IF YOU DO MAKE THE GOODS AVAILABLE TO THE SELLER AND THE SELLER DOES NOT PICK THEM UP WITHIN TWENTY (20) DAYS OF THE DATE OF YOUR NOTICE OF CANCELLATION, YOU MAY RETAIN OR DISPOSE OF THE GOODS WITHOUT ANY FURTHER OBLIGATION. IF YOU FAIL TO MAKE THE GOODS AVAILABLE TO THE SELLER, OR IF YOU AGREE TO RETURN THE GOODS TO THE SELLER AND FAIL TO DO SO, THEN YOU REMAIN LIABLE FOR PAYMENT OF SAID GOODS.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM, TO [*name of seller*], AT [*address of seller's place of business*] NOT LATER THAN MIDNIGHT OF *(date)*.

I HEREBY CANCEL THIS TRANSACTION.

(Date) _____ (Buyer's signature)

* * * * * * *

(c) Failing to orally inform each prospective student of his right to cancel at the time he signs a contract or agreement for the sale of any course of instruction.

(d) Misrepresenting in any manner the prospective student's right to cancel.

(e) Failing or refusing to honor any valid notice of cancellation by a prospective student and within ten (10) business days after the receipt of such notice to: (i) refund all payments made under the contract or sale; (ii) return any materials or property traded in, in substantially as good condition as when received by respondent; (iii) cancel and return any negotiable instrument executed by the prospective enrollee in connection with the contract or sale.

(f) During the cancellation period described herein, respondents shall not initiate contacts with such contracting persons other than contacts permitted by this paragraph.

7. Making any representations of any kind whatsoever, which are not already proscribed by other provisions of this order, in connection with the advertising, promoting, offering for sale, sale or distribution of courses of study, training or instruction in the field of gas turbine mechanic's training or any other course offered to the public in any field in commerce, for which respondents have no reasonable basis prior to the making or dissemination thereof.

8. Furnishing or otherwise placing in the hands of others the means and instrumentalities by and through which the public may be misled or deceived in the manner, or by the acts and practices prohibited by the order.

9. *It is further ordered,* That:

(a) Respondents herein deliver, by hand or by registered mail, a copy of this order to each of their present and future franchisees, licensees, employees, sales representatives, agents, solicitors, brokers, independent contractors or to any other person who promotes, offers for sale, sells or distributes any course of instruction included within the scope of this order;

(b) Respondents herein provide each person or entity so described in subparagraph (a) of this paragraph with a form returnable to the respondents clearly stating his or her intention to be bound by and to conform his or her business practices to the requirements of this order; retain said statement during the period said persons or entity is so engaged; and make said statement available to the Commission's staff for inspection and copying upon request.

(c) Respondents herein inform each person or entity described in subparagraph (a) of this paragraph that the respondents will not use or engage or will terminate the use or engagement of any such party, unless such party agrees to and does file notice with the respondents that he or she will be bound by the provisions contained in this order;

(d) If such party as described in subparagraph (a) of this paragraph

will not agree to file the notice set forth in subparagraph (b) above with the respondents and be bound by the provisions of this order, the respondents shall not use or engage or continue the use or engagement of such party to promote, offer for sale, sell or distribute any course of instruction included within the scope of this order;

(e) Respondents herein inform the persons or entities described in subparagraph (a) above that the respondents are obligated by this order to discontinue dealing with or to terminate the use or engagement of persons or entities who continue on their own the deceptive acts or practices prohibited by this order;

(f) Respondents herein institute a program of continuing surveillance adequate to reveal whether the business practices of each said person or entity described in subparagraph (a) above conform to the requirements of this order;

(g) That respondents discontinue dealing with any person described in subparagraph (a) above, revealed by the aforesaid program of surveillance, who engages on his own in the acts or practices prohibited by this order; *provided, however,* that violation of any provision of this order by present or future employees of independent contractors shall not be deemed a violation of this order by respondents unless respondents, upon knowledge of such violation, fail to take, within a reasonable time, corrective action to insure that such act or practice is terminated; and *further provided,* that in the event remedial action is taken, the sole fact of such dismissal or termination shall not be admissible against respondents in any proceeding brought to recover penalties for alleged violation of any other paragraph of this order.

(h) Respondents herein maintain files containing all inquiries or complaints from any source relating to acts or practices prohibited by this order, for a period of two years after their receipt, and that such files be made available for examination by a duly authorized agent of the Federal Trade Commission during the regular hours of the respondents' business for inspection and copying.

10. *It is further ordered,* That respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

11. *It is further ordered,* That the respondent corporation shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the respondent corporation which may affect compliance obligations arising out of this order.

12. *It is further ordered,* That the individual respondents named herein promptly notify the Commission of the discontinuance of his or her present business or employment with respondent corporation and of his or her affiliation with a new business or employment related to the vocational training industry. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he or she is engaged as well as a description of his or her duties and responsibilities.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

APPENDIX A

Base Period

The first *Base Period* shall be the six-month period ending three months prior to the effective date of this order, such period to commence on the first day of the first month in the *Base Period,* and end on the last day of the sixth month. Subsequent *Base Periods* shall be of six months duration commencing on the next day following the termination of the prior *Base Period. Base Periods* shall be numbered consecutively beginning with the first *Base Period* (i.e., *Base Period* #1) as defined above.

Monitoring Phase

The three-month period immediately following the close of a *Base Period* shall be used by respondents to monitor and compile the total number of all students, and the number of students who dropped out, at any time during the *Base Period,* and the employment success results of graduates during that *Base Period.* Respondents may include in the computation of statistics for the *Base Period* any employment statistics based upon events occurring during the three-month *Monitoring Phase.*

Dissemination Phase

On the first business day following three months after the termination of a *Base Period,* respondents shall begin dissemination of that just-terminated *Base Period's* statistics as required by this order, continuing such dissemination until the first business day following three months after the termination of the next *Base Period,* at which time dissemination of the next set of *Base Period* statistics must begin.

APPENDIX B

DISCLOSURE FORM BASE PERIOD # ____

(NAME OF SCHOOL)

DROP-OUT AND PLACEMENT RECORD OF

(NAME OF COURSE)

FOR THE PERIOD (DATE) THROUGH (DATE)

1. TOTAL NUMBER OF STUDENTS ..... ——.

2. STUDENTS WHO DROPPED OUT:
NUMBER..... ——.
PERCENTAGE ..... ——%

3. STUDENTS WHO GRADUATED:
NUMBER..... ——.
PERCENTAGE ..... ——%

4. TOTAL NUMBER OF GRADUATES WHO FOUND EMPLOYMENT IN A POSITION FOR WHICH THIS COURSE TRAINED THEM..... ——.

THESE GRADUATES FINDING EMPLOYMENT WERE:

——% OF ALL STUDENTS, AND
——% OF ALL GRADUATES.

THESE GRADUATES WERE HIRED IN THE FOLLOWING SALARY RANGES:

	Number	% of All Students	% of Graduates
$300-399 per month			
$400-599 per month			
$600-799 per month			
$800 and over per month			

IN THE MATTER OF

CENTURY 21 COMMODORE PLAZA, INC., ET AL.

Docket 9088. Interlocutory Order, Oct. 19, 1977

Denial of application to review ALJ's order denying a motion to intervene.

ORDER DENYING APPLICATION TO REVIEW ORDER DENYING MOTION TO INTERVENE

On September 19, 1977 Administrative Law Judge Lewis F. Parker denied applicant David Unterberg's motion to intervene in the above-captioned matter for the reason that he failed to present facts sufficient to support his motion.[1] Mr. Unterberg has applied to the Commission for review of that order.

Section 3.23(b) of the Commission's Rules of Practice provide that in appeals from a determination by an Administrative Law Judge the moving party is required to attach the "portions of the record on which the moving party is relying." Nothing in the papers submitted by applicant demonstrates that the ALJ erred in finding that the movant had failed to present facts that satisfied the standard for intervention.

It is ordered, That Mr. Unterberg's application for review of the order denying his motion to intervene be, and hereby is, denied.

[1] "[B]efore the Commission will allow intervention into its proceedings, it must be demonstrated that (1) the persons seeking such intervention desire to raise *substantial* issues of law or fact which would not otherwise be properly raised or argued, and (2) the issues thus raised are of sufficient importance and immediacy to warrant an additional expenditure of the Commission's limited resources on a necessarily longer more complicated proceeding in that case, when considered in light of other important matters pending before the Commission." *Firestone Tire & Rubber Co.*, 77 F.T.C. 1666, 1669 (1970).

IN THE MATTER OF

THE RAYMOND LEE ORGANIZATION, INC., ET AL.

Docket 9045. Interlocutory Order, Oct. 21, 1977

Denial of respondents' request for extension of time for filing answer to motion for leave to file amicus curiae brief.

ORDER DENYING RESPONDENT'S REQUEST FOR AN EXTENSION OF TIME FOR FILING AN ANSWER

By motion filed October 4, 1977, Mr. Norman Axe, attorney representing various persons and non-profit entities, requests that the Commission grant leave to file a brief of an amicus curiae in the above-captioned matter. On September 30, 1977, pursuant to Commission Rules 3.52(h) and 4.4(b), Mr. Axe, sending by mail, gave notice to the interested parties.

By letter received October 18, 1977, Mr. Malcolm I. Lewin, attorney representing The Raymond Lee Organization, Inc. and Raymond Lee, requests the Commission to grant an extension of time for filing an answer to the above motion for leave to file a brief of an amicus curiae.

Assuming arguendo that under Commission Rule 3.52(h) respondent has a right to file an answer to a motion requesting leave to file a brief of an amicus curiae, the specified time within which the answer should have been forthcoming has expired.[1] Moreover, the Commission finds nothing in respondent's letter of October 18, 1977 that would justify the granting of such an extension of time. Accordingly,

It is ordered, That said motion be, and it hereby is, denied.

[1] Pursuant to Rule 4.4(c)(1), service was complete on October 7, 1977, because Mr. Malcolm I. Lewin has indicated to the Secretary's Office that the Post Office delivered Mr. Norman Axe's motion on that day. Commission Rule 3.22(c) requires that within 10 days after service of any written motion, the opposing party shall answer. In measuring this specified period, intervening Saturdays, Sundays and national holidays are counted because, as Rule 4.3(a) provides, the period within which one must answer exceeds seven days. Therefore, even if measured from this date, the specified period expired on Wednesday, October 19, 1977.

IN THE MATTER OF

GATEWAY OVERSEAS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 9065. Complaint, Dec. 19, 1975 — Decision, Oct. 27, 1977

This consent order, among other things, requires a New York employment agency to cease misrepresenting the availability of employment opportunities and the effectiveness of its employment services program; the availability of overseas employment in all trades, skills and professions; and the demand for American personnel by overseas employers. The order further prohibits use of a mandatory arbitration clause in contracts which commit consumers to arbitrate all disputes at a designated tribunal; and the acceptance of any fee prior to acceptance of employment, other than those fees charged for preparation or duplication of resumes. Additionally, the order requires the firm to maintain complete business records; conspicuously post prescribed disclosure statements and to include such statements in all sales contracts.

Appearances

For the Commission: *Shirley F. Sarna, Laura P. Worsinger* and *Ellen Zweibel.*

For the respondents: *Barry Bell,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Gateway Overseas, Inc., a corporation, and Michael Anderson, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Gateway Overseas, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 1501 Broadway, New York, New York.

Respondent Michael Anderson, an individual, is an officer and director of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondent.

PAR. 2. Unless otherwise required by context, the following

definition shall apply for purposes of this complaint: the term "companies" means corporations and other legal entities of any type whatever, partnerships and individuals doing business overseas or elsewhere, and governments and governmental subdivisions, agencies and instrumentalities.

PAR. 3. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale and sale of services and related materials to persons seeking employment, such services including but not limited to the preparation and distribution of personal resumes, letters of introduction, and names and addresses of companies thought to be prospective employers to which respondents' clients can mail the aforementioned resumes and letters of introduction when attempting to obtain employment including overseas employment. Respondents also have provided and are now providing employment research services to other similar businesses in return for a fee.

PAR. 4. In the course and conduct of their business respondents require, as a prerequisite to commencing or performing services for any individual client, that said client pay or make unconditional commitment to pay in full, in advance, respondents' non-refundable prescribed fee. Said fee has been set during the period of respondents' operation at $245 and $185, usually expressed as a service charge.

PAR. 5. In the course and conduct of their business respondents now cause and for some time last past have caused advertisements for the above-described employment services to appear in newspapers of general and interstate circulation. In the further course and conduct of their business respondents have caused documents and communications pertaining to said business to be transmitted across state lines by means of the United States mail and other means to and from respondents' principal office in the State of New York to offices, customers and potential customers in other States of the United States and foreign countries; and in addition, respondents cause and have caused customers and other individuals and funds to pass between the State of New York and various other States of the United States and foreign countries. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in their said business in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 6. In the course and conduct of their business, and for the purpose of inducing the purchase of and payment for their services and materials, respondents have made and caused to be made, and are now making and causing to be made through advertisements published in newspapers of general and interstate circulation,

through brochures, form letters and other promotional matter, and through oral statements by respondents, their agents and representatives during personal interviews and consultations with prospective clients, numerous statements and representations with respect to the availability of jobs overseas and the salaries and other benefits incident thereto, and the nature, type and effectiveness of their employment services program.

Typical and illustrative of the said statements and representations, but not all inclusive thereof, are the following:

1. Advertisements in various newspapers sometimes inserted in "Help Wanted" columns, stating, *inter alia:*

a. HIGH PAY - NO TAXES! Men & Women Oppor'ties OVERSEAS All Trades, Skills & Profs. We assist you. Service charge. No placement fee.

b. Have you considered the OVERSEAS areas. . .Australia, Asia, Europe? or the top U.S. areas. . .Such areas as Calif., Fla., Hawaii, Colorado, etc.?

c. Has ANYONE ever thought of looking for a good local, national or overseas job through a resume service? Take 15 minutes of your time NOW to develop the rest of your life through our unexcelled services. Call, or write, office in your area.

d. WORK OVERSEAS—HIGH PAY—BONUSES—NO TAXES—WORK OVERSEAS—and choice U.S. spots.

e. All Trades, Skills & Professions—Go with GATEWAY. First in N.Y.!

2. Form letters, promotional matter and oral representations made or disseminated by or for respondents, stating, *inter alia:*

f. Opportunities the world over. . . .We've served thousands.

g. GATEWAY OVERSEAS, INC., organized and operating under the laws of New York State is the nation's foremost Service Organization in its field.

We offer a unique approach to persons seeking lucrative and rewarding opportunities either Overseas or in the choice spots within the United States, Canada and Mexico.

Our service is individually tailored to your experience and background as well as to your geographic areas of preference.

h. A good resume and cover letter are of no value unless you have some place to send it. Here is where the all important function of our Research Department comes in. Their constant scanning of hundreds of foreign and American newspapers, trade journals, and government publications allows them to keep accurate and up-to-date information on thousands of American and Foreign companies with national and international operations. An intensive and individualized research is then conducted in which we select a minimum of 20 companies or organizations, which are in your field and are located in the geographic area of your choice. These companies are specifically matched to your qualifications and represent those which we feel will offer the best opportunities for you.

i. Any individual serious about solid career advancement should know about the Gateway Service. It is without question the most complete and professional

service of its kind in the nation. No company or individual is in a better position to help you in achieving your career goals than Gateway Overseas, Inc. At Gateway *YOUR SUCCESS IS OUR ONLY CONCERN.*

j. One of the most comprehensive and sophisticated job searches available in the United States - specifically designed to make the most immediate and efficient coordination of prospective employers and qualified individuals currently available.

k. If you are not completely satisfied with the results, we will service you until you are, regardless of the additional costs to Gateway. Although many people never request a second mailing, we will provide any additional mailings you request until you get the exact response you are seeking.

l. Through our global job research service, we know where the current and upcoming openings are from day to day.

m. YOUR OVERSEAS INCOME COULD RANGE FROM 25% TO 150% HIGHER THAN YOU WOULD MAKE AT DOMESTIC RATES OF PAY. HOWEVER, IT'S NOT POSSIBLE TO QUOTE YOU AN EXACT SALARY SINCE THESE FIGURES ARE INFLUENCED BY: (1) RATES CUSTOMARY IN THE UNITED STATES; (2) YOUR PARTICULAR QUALIFICATIONS AND OCCUPATION; (3) CURRENT NEEDS; (4) GEOGRAPHIC LOCATION OF THE PARTICULAR JOB; (5) HAZARDOUS CONDITIONS INVOLVED, IF ANY; AND (6) YOUR PRIOR FOREIGN CONTRACTS. THE SUBSISTENCE ALLOWANCE IS NON-TAXABLE; NEITHER IS YOUR INCOME AFTER 510 DAYS.

YOUR ROOM AND BOARD WILL BE FURNISHED FOR YOU OR MADE AVAILABLE TO YOU FOR A MINIMUM CHARGE. CERTAIN HIGH PRIORITY, TOP-FLIGHT PERSONNEL WILL BE FURNISHED HOUSING BY THE COMPANY.

TRANSPORTATION IS GENERALLY FURNISHED - FROM THE POINT OF HIRE AND RETURN WHEN THE CONTRACT HAS BEEN COMPLETED. SOME ORGANIZATIONS WILL ALSO PROVIDE TRANSPORTATION FOR YOUR FAMILY, IF SUITABLE LIVING QUARTERS AND ARRANGEMENTS CAN BE MADE FOR THEM ALSO.

SUBSISTENCE ALLOWANCE FROM $250.00 to $500.00 A MONTH IS GENERALLY PAID IN ADDITION TO YOUR BASE SALARY. THE EXACT AMOUNT OF THIS IS GOVERNED BY THE COST OF LIVING AT THE LOCATION AND THE PARTICULAR EMPLOYEE FRINGE BENEFITS FURNISHED BY THE EMPLOYER.

n. Then we circulate it (the resume) with a covering letter signed by the client and geared directly to the staff needs of about 40 companies or private institutions whom we know have job openings for which our client is qualified.

o. Anderson says about 70% of his clients get and accept satisfactory job offers with the first mailing.

p. *WHY DO YOU WANT TO WORK OVERSEAS?*

Is it because: a) Salaries generally range from 25% to 150% higher than those in the United States? b) Subsistence allowances of between $250 and $500 a month are normally paid? c) The majority of companies pay the roundtrip costs of you and your family?

PAR. 7. By and through the use of the aforesaid statements,

representations and advertisements, and others of similar import and meaning, but not expressly set out herein, respondents represent and have represented, directly or by implication, that:

1. Overseas jobs for Americans are plentiful in all trades, skills, and professions.

2. Overseas jobs for Americans have been and are immediately or imminently available.

3. Overseas jobs for Americans are plentiful in highly desirable areas such as Europe and Australia.

4. Respondents provide an expert and comprehensive employment service.

5. Respondents have specific or special knowledge of a substantial number of job openings or opportunities in highly desirable areas such as Australia and Europe and other locations for a significant number of clients.

6. Respondents have special, unique, exclusive or expert knowledge of the specific employment needs and hiring practices of a substantial number of companies.

7. Respondents' services include the matching or coordinating of a client's specific skills with companies which have a need for such skills.

8. Respondents' clients can expect their pay to be 25 percent – 150 percent higher than it would be in the United States for a comparable position.

9. Respondents' clients can expect their earnings overseas to be exempt from income taxes after 510 days.

10. Respondents' clients can expect subsistence allowances when working overseas and roundtrip transportation overseas to be paid for by the employer.

11. Substantially every person who becomes a client of respondents can reasonably expect to obtain employment as a result of respondents' services.

PAR. 8. In truth and in fact:

1. With the exception of a few occupations, jobs overseas for Americans have not been plentiful.

2. Jobs overseas have seldom been available immediately, imminently, or at any time to respondents' clients.

3. Overseas jobs for Americans are scarce, especially in such highly desirable areas as Europe and Australia.

4. Respondents do not have the experience or training necessary to provide an expert employment service, nor do they have the employer contacts and specific information necessary to provide a comprehensive employment service.

5. Respondents have no specific or special knowledge of any substantial number of job openings or opportunities in any part of the world, in any significant number of occupations.

6. Respondents have no special, unique, exclusive, or expert knowledge of the specific employment needs and hiring practices of a substantial number of companies. The policy of the vast majority of companies doing business overseas is to hire only local nationals, with rare exceptions for Americans with highly specialized or top management skills.

7. Respondents do not match or coordinate clients' specific skills with companies' specific needs, but identify each by broad category only.

8. A great majority of the overseas jobs for which respondents' clients are qualified do not provide high pay by American standards.

9. Overseas earnings are not exempt from income taxes after 510 days. Overseas salaries are subject to income taxation by the particular foreign state in which the client is employed.

10. Respondents' clients cannot expect subsistence allowances when working overseas nor roundtrip transportation overseas to be paid for by the employer because such benefits are only provided for a select category of personnel.

11. With the exception of a very few occupational skills, the great majority of persons who become clients of respondents cannot reasonably expect to obtain employment anywhere as a result of respondents' services. In the past, only a minute percentage of respondents' clients have obtained jobs as a result of respondents' efforts.

Therefore, the statements and representations as set forth in Paragraphs Six and Seven hereof were and are false, misleading and deceptive.

PAR. 9. By and through the use of the statements and representations described and exemplified in Paragraphs Six and Seven hereof, respondents represented and continue to represent to unemployed persons and other job seekers that they have knowledge of jobs currently available in all trades, skills and professions, and that individuals taken on as clients will in most instances obtain employment through the use of their services. In reliance on such representations of respondents' service as essentially one that will in most instances successfully lead to a satisfactory offer of employment, many of such unemployed persons and other job seekers have been induced, and continue to be induced, to their substantial hardship and detriment into becoming clients of respondents and

into paying or making unconditional commitments to pay respondents' prescribed fee in advance as required.

In fact, however, respondents' services have failed, and continue to fail, as a means of obtaining employment for the great majority of clients.

Moreover, the collecting of respondents' fee in advance of placement has diminished and tended to eliminate as to each individual client, respondents' incentive to provide and continue diligent efforts and service toward finding employment opportunities and matching clients thereto.

Therefore, it was and is an unfair trade practice for respondents to require clients to pay in advance for their services as represented and described in Paragraphs Three through Eight above.

PAR. 10. In the course and conduct of their business, as aforesaid, respondents require their clients to sign a contractual agreement for services, hereafter referred to as "the contract." On the aforesaid contract, respondents have included a provision requiring that all disputes involving the terms and obligations of the contract be referred to arbitration at a named tribunal designated by respondents. Said mandatory arbitration clause is not negotiated by and between the parties; and respondents' clients, as a result of signing this contract to utilize respondents services, are thereby bound to arbitrate all grievances regarding the contract with respondents. Respondents' clients are not afforded an opportunity to reject mandatory arbitration when signing respondents' contract.

PAR. 11. Respondents fail to disclose to prospective clients, prior to the signing of the contract, that arbitration is a binding resolution for all disputes arising under the contract nor do they disclose or explain to such clients material facts regarding the procedures, rules or fees of the named tribunal.

PAR. 12. The arbitration tribunal designated in respondents' contract requires individuals who wish to initiate an arbitration to pay an administrative filing fee of $100. This administrative filing fee of the designated tribunal is significantly greater than the fees for some courts which could have jurisdiction of claims arising out of respondents' contracts and, in many instances said fee constitutes a substantial percentage of the amount involved in disputes arising out of respondents' contracts. Consumers are or may thereby be deterred from seeking redress through the designated arbitral forum.

PAR. 13. The arbitration tribunal designated by respondents is located in New York. Arbitration in New York is, by law, a binding award. As a result of the use of the aforesaid contract under the circumstances described herein, respondents substantially deprive

clients of a meaningful opportunity to obtain or seek redress when disputes arise in connection with respondents' contract or obligations.

PAR. 14. Therefore, respondents' use of the aforesaid arbitration clause in the circumstances described herein was and is an unfair act or practice in violation of Section 5 of the Federal Trade Commission Act.

PAR. 15. In the course and conduct of their business, and at all times mentioned herein, respondents have been and now are in substantial competition, in or affecting commerce, with corporations, firms, and individuals engaged in the sale of materials and performance of services of the same general kind and nature as those sold and performed by respondents.

PAR. 16. The use by respondents of the aforementioned false, misleading, unfair, and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations were, and are true, and into the purchase of respondents' services and the payment of respondents' fees by reason of said erroneous and mistaken belief.

PAR. 17. The aforesaid acts and practices of respondents, as herein alleged, are unethical, oppressive, exploitative and cause substantial injury to consumers, and constituted, and now constitute unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

PAR. 18. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and respondents' competitors and constituted, and now constitute, unfair methods of competition and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint; and

The Commission having withdrawn the matter from adjudication for the purpose of considering settlement by the entry of a consent order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the

complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 3.25 of its Rules, the Commission hereby makes the following jurisdictional findings, and enters the following order:

1. Respondent Gateway Overseas, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its former principal office and place of business located at 1501 Broadway, New York, New York. The corporate respondent's present address is the same as that of the individual respondent.

Respondent Michael Anderson, an individual, is an officer and director of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent and his address is 5760 N. Campbell Ave., Tuscon, Arizona.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Gateway Overseas, Inc., a corporation, its successors and assigns, and its officers, and Michael Anderson, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device in connection with the advertising, offering for sale, or sale of job search services or materials or articles incident thereto, or similar services, materials, or articles in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

A. Representing in any manner, directly or by implication, that:

(1) Overseas jobs for Americans are plentiful in any trade, skill, or profession.

(2) Overseas jobs for Americans have been and are immediately or imminently available.

(3) Overseas jobs for Americans are plentiful in highly desirable areas such as Europe and Australia.

(4) Respondents provide an expert and comprehensive employment service.

(5) Respondents have specific or special knowledge of substantial numbers of job openings or opportunities in the United States or overseas for a significant number of clients.

(6) Respondents have special, unique, exclusive or expert knowledge of the specific employment needs and hiring practices of a substantial number of employers.

(7) Respondents' services include the matching or coordinating of clients' skills with employers needing said skills.

(8) Respondents' clients can expect their pay to be 25 percent - 150 percent higher than it would be in the United States for a comparable position.

(9) Respondents' clients can expect to receive subsistence allowances when working overseas.

(10) Respondents' clients can expect round trip transportation expenses to be paid by the employer.

(11) Respondents' clients can expect their earnings overseas to be exempt from income taxes after 510 days.

(12) Substantially every person who becomes a client of respondents can expect to obtain employment as a result of respondents' services.

B. Misrepresenting in any manner, directly or by implication:

(1) The demand for Americans to fill overseas positions; the availability or immediacy of any employment opportunity; or the availability of jobs for Americans in any geographic areas.

(2) The respondents' professional qualifications; the nature or character of the services provided by respondents; the respondents' knowledge of the needs and hiring practices of employers; or the respondents' knowledge of specific job opportunities.

(3) The services provided by respondents in coordinating clients' skills with employers having a need for such skills; or the likelihood of obtaining employment as a result of the utilization of respondents' services.

(4) The earnings respondents' clients can expect to receive or any other terms, conditions or compensation incident to employment; or the extent to which the earnings of respondents' clients are subject to taxation.

C. Charging or accepting any fee from a client or prospective client prior to the acceptance by the client of a firm offer of employment resulting from the utilization of respondents' services.

Provided, however, that reasonable fees may be charged for the preparation or duplication of a resume prior to the acceptance of an offer of employment, if respondents' resume service is sold independently of any other job search service.

Further provided, that the sale of resume services will not be deemed independent of other job search services unless a notice stating that respondents' services may be purchased separately is: (i) conspicuously posted in respondents' reception area; (ii) conspicuously posted in all areas where prospective clients are interviewed; and (iii) conspicuously stated in all of respondents' contracts. *Further provided,* that the notice in items (i) and (ii) above, shall be in capital block letters no less than one and one-half (1-1/2) inches high; and that the notices required by items (i), (ii) and (iii) above, shall be captioned "IMPORTANT NOTICE - PLEASE READ." Furthermore, said notices shall itemize the various services offered and the prices for each of such services.

D. Entering into any contract or agreement with a client, prior to the time a dispute arises, which requires that disputes arising in connection with the contract or agreement be submitted to arbitration for resolution.

It is further ordered, That respondents maintain at all times in the future, complete business records relative to the manner and form of their continuing compliance with the above terms and provisions of this order.

It is further ordered, That the respondents shall forthwith distribute a copy of this order to each operating division, to all present and future franchisees and licensees, and to all of respondents' personnel now or hereafter engaged in the offering for sale, or sale of respondents' job search services or related materials or articles, or in any aspect of the preparation, creation or placing of advertising of such services, materials or articles, and that respondents secure from each such person a signed statement acknowledging receipt of said order.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or corporations, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That each individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. In addition, for a period of ten years from

the effective date of this order, the individual respondent shall promptly notify the Commission of each affiliation with a new business or employment. Each such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

DAYCO CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2905. Complaint, Oct. 27, 1977 — Decision, Oct. 27, 1977

This consent order, among other things, requires a Dayton, Ohio manufacturer and importer of occupational safety products and equipment to cease misrepresenting that its products meet non-existent "government standards," or that they are approved, endorsed or required by the Occupational Safety and Health Administration (OSHA). The firm is also required to cease using, or licensing the use of the "OSHA-SPEC" trademark, and to take steps to prevent the importation of "OSHA-SPEC" branded goods. Additionally, the order prohibits the company from publishing quotations from the OSHA Act or regulations, without including all relevant portions of the quoted section.

Appearances

For the Commission: *Sharon J. Devine* and *Allan M. Huss.*
For the respondent: *Sara Jane Little,* Dayton, Ohio.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Dayco Corporation, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. For purposes of this complaint, the following definitions shall apply:

(a) "OSHA" means the Occupational Safety and Health Administration, an agency of the United States Government established pursuant to authority granted to the Secretary of Labor by the OSHA Act.

(b) "OSHA Act" includes the Williams-Steiger Occupational Safety and Health Act of 1970, 84 Stat. 1593, 29 U.S.C. 651-678 (1975), and the regulations promulgated thereunder, 29 C.F.R. 1900, *et seq.* (1976).

(c) "Hazardous condition" means a circumstance or set of circumstances against which an employer must take precaution(s) in order to comply with the OSHA Act.

PAR. 2. Respondent Dayco Corporation is a corporation organized,

existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 333 West First St., in the City of Dayton, State of Ohio.

PAR. 3. Respondent is now, and for some time last past has been, engaged in the manufacturing, advertising, offering for sale, sale, and distribution to the public of general industrial products and equipment, including occupational safety products and equipment.

PAR. 4. In the course and conduct of its aforesaid business, respondent now causes, and for some time last past has caused, its said products, when sold, to be shipped from its places of business in the various states to purchasers thereof located in various other States of the United States, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. In the course and conduct of its aforesaid business, respondent caused to be registered by the United States Commissioner of Patents and Trademarks, a trademark consisting of the words "OSHA-SPEC." The aforesaid mark was placed upon the Principal Register and given registration number 962327 on July 3, 1973, and was registered for use upon plastic sheet goods and other goods of International Trademark Class 17.

PAR. 6. In the course and conduct of its aforesaid business, respondent, by the use of its registered trademark, "OSHA-SPEC," in connection with the manufacturing, advertising, offering for sale, and sale of its occupational safety products and equipment, represents to purchasers and prospective purchasers, directly or by implication, that:

(a) Products and equipment advertised, offered for sale, sold, or distributed in conjunction with the "OSHA-SPEC" mark are approved or endorsed by OSHA.

(b) The use of all products and equipment advertised, offered for sale, sold, or distributed in conjunction with the "OSHA-SPEC" mark constitutes compliance with the OSHA Act for protection against hazardous conditions.

(c) All products and equipment advertised, offered for sale, sold, or distributed in conjunction with the "OSHA-SPEC" mark meet the standards and requirements prescribed or referenced by the OSHA Act.

PAR. 7. In truth and in fact:

(a) OSHA does not approve or endorse any products or equipment.

(b) The use of certain products advertised, offered for sale, sold, or distributed in conjunction with the "OSHA-SPEC" mark does not

constitute compliance with the OSHA Act for protection against certain hazardous conditions.

(c) The OSHA Act does not prescribe or reference standards and requirements for certain products and equipment advertised in conjunction with the "OSHA-SPEC" mark.

Therefore, the representations, acts, and practices as set forth in Paragraphs Six and Seven hereof were and are unfair, misleading, and deceptive.

PAR. 8. In the further course and conduct of its business as aforesaid, respondent is now, and for some time last past has been, printing and distributing to the public at large a publication entitled "OSHA-SPEC Buyer's Guide", which contains descriptions and pictures of products offered for sale by respondent, together with direct or paraphrased quotations from the OSHA Act.

By and through the publication and dissemination of this publication, and certain quotations which are incomplete therein, respondent represents to purchasers and prospective purchasers that:

(a) Certain products and equipment of the type offered for sale in the "OSHA-SPEC Buyer's Guide" are required to be used by purchasers to comply with the OSHA Act.

(b) In certain instances, no other products and equipment except the type offered for sale, or no other methods of compliance are acceptable for use in situations where hazardous conditions exist.

PAR. 9. In truth and in fact:

(a) Products and equipment of the type offered for sale in the "OSHA-SPEC Buyer's Guide" are not necessarily required to be used by purchasers to comply with the OSHA Act.

(b) In certain instances, alternative methods of compliance, or the use of products and equipment other than the type featured in the "OSHA-SPEC Buyer's Guide" are allowable under the OSHA Act.

Therefore, the representations, acts, and practices as set forth in Paragraphs Eight and Nine hereof were and are unfair, misleading, and deceptive.

PAR. 10. In the conduct of its aforesaid business, at all times mentioned herein, respondent has been in substantial competition in and affecting commerce with corporations, firms, and individuals in the offering for sale, sale, and distribution of safety products and equipment of the same general kind and nature as those sold by respondent.

PAR. 11. The use by respondent of the trademark "OSHA-SPEC" and the aforesaid false, misleading, and deceptive statements, representations, acts, and practices, has had, and now has, the capacity and tendency to lead members of the purchasing public into

the erroneous and mistaken belief that said statements and representations were and are true, and into the purchase of substantial quantities of respondent's products and equipment by reason of said erroneous and mistaken belief.

PAR. 12. The aforesaid acts and practices of respondent herein alleged were, and are, all to the prejudice and injury of the public and of respondent's competitors, and constituted, and now constitute, unfair methods of competition in and affecting commerce and unfair and deceptive acts and practices in and affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Cleveland Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by the respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Dayco Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 333 West First St., Dayton, Ohio.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding, and of the respondent, and the proceeding is in the public interest.

ORDER

For purposes of this order, the following definitions shall apply:

(a) "OSHA" means the Occupational Safety and Health Administration, an agency of the United States Government established pursuant to authority granted to the Secretary of Labor by the OSHA Act.

(b) "OSHA Act" includes the Williams-Steiger Occupational Safety and Health Act of 1970, 84 Stat. 1593, 29 U.S.C. 651–678 (1975), and the regulations promulgated thereunder, 29 C.F.R. 1900, *et seq.* (1976).

(c) "Hazardous condition" means a circumstance or set of circumstances against which an employer must take precaution(s) in order to comply with the OSHA Act.

It is ordered, That respondent Dayco Corporation, a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, advertising, offering for sale, sale, or distribution of products or equipment in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, orally or in writing, or by any other means:

(1) That any product or equipment advertised, offered for sale, sold, or distributed by respondent is approved or endorsed by OSHA or by any other governmental agency, *provided, however,* that this subparagraph shall not prohibit statements that any product or equipment is certified, approved, or endorsed by a governmental agency when, in fact, such product or equipment has been certified, approved, or endorsed by such agency.

(2) That the use of any product or equipment advertised, offered for sale, sold, or distributed by respondent constitutes compliance with the requirements of the OSHA Act:

(a) When hazardous conditions exist and the use of such product or equipment does not constitute compliance with the standards prescribed or referenced by the OSHA Act for such hazardous conditions;

(b) When the use of that product or equipment to protect against certain specific hazardous conditions is contra-indicated, unless respondent clearly and conspicuously discloses the specific conditions for which the use of the product or equipment is contra-indicated.

(3) That any product or equipment advertised, offered for sale, sold, or distributed by respondent meets the standards or requirements

prescribed or referenced by the OSHA Act when, in fact, no such standards or requirements exist.

It is further ordered, That respondent cease and desist from using the trademark "OSHA-SPEC" in conjunction with any product or equipment, or in conjunction with the advertising, offering for sale, selling, or distribution thereof; and any other title, corporate name, trade name, trademark, whether registered or not, or any other designation or device which in itself represents, directly or by implication, that respondent's occupational safety products or equipment are approved, endorsed, or accepted by, or connected or associated with, any agency or instrumentality of the United States Government. *Provided, however,* that respondent shall be allowed to disseminate, until December 31, 1977, existing stocks of its 1977 catalog as are in existence upon the date this order becomes final. Respondent shall not cause or permit the placement of any advertisement using the OSHA-SPEC mark after the date this order becomes final. The display of advertisements placed in the "Yellow Pages" prior to the date this order becomes final, which cannot be discontinued by respondent, shall not be deemed a violation of this order.

It is further ordered, That respondent cease and desist from assigning or licensing the use of the trademark "OSHA-SPEC" by any person, partnership, or corporation.

It is further ordered, That, within thirty (30) days after this order becomes final, respondent shall take such steps as are necessary to prevent importation into the United States of goods bearing, or sold in conjunction with, the "OSHA-SPEC" trademark, including the deposit of the mark with the Department of the Treasury, Bureau of Customs, pursuant to 19 U.S.C. 1526.

It is further ordered, That respondent cease and desist from reproducing the text, in whole or in part, of the OSHA Act in any advertisement, catalog, or other printed matter which is, or which is designed to be, disseminated by respondent to its customers, unless respondent clearly and conspicuously reproduces such portion of the regulatory section sufficient to disclose alternative methods of compliance, if any, or references to pertinent exceptions, if any, and underlines any portion of the section that describes or permits a method or methods of compliance which differ(s) from the primary method of providing hazard protection referred to by pertinent regulatory sections. *Provided, however,* that this paragraph shall not prohibit respondent from reproducing the section numbers and corresponding captions used in the OSHA Act to identify subject matter.

It is further ordered, That respondent shall forthwith distribute a

copy of this order to each of its operating divisions and subsidiaries and to all present and future corporate officers, field, sales, and office personnel, which manufacture or sell occupational safety products and equipment, and prominently post a copy of this order in each office affected by this order.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporation such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondent shall, within sixty (60) days after service of it upon this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

EAST PROVIDENCE CREDIT UNION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2906. Complaint, Oct. 27, 1977 — Decision, Oct. 27, 1977

This consent order, among other things, requires an East Providence, R.I. credit union to cease failing to provide consumers, in connection with the extension of credit, such material and disclosures as are required by Federal Reserve Board regulations.

Appearances

For the Commission: *William P. McDonough.*
For the respondent: *Albert B. West,* Providence, R.I.

COMPLAINT

Pursuant to the provisions of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that East Providence Credit Union, a corporation, hereinafter referred to as respondent, has violated the provisions of said Acts and the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent East Providence Credit Union is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island and Providence Plantations, with its principal office and place of business located at 15 Circle St., East Providence, Rhode Island.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the business of lending money to the general public.

PAR. 3. In the ordinary course and conduct of its business as aforesaid, respondent regularly extends, and for some time last past has regularly extended consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondent, in the ordinary course of its business, as aforesaid, has caused and is causing to be

extended consumer credit, as "consumer credit" is defined in Regulation Z, and has caused and is causing customers to execute a binding promissory note secured by a first mortgage not for the purpose of acquiring a home and for second mortgages. Credit cost disclosures made in conjunction with the execution of the promissory note are contained on one side of a separate statement entitled, "Consumer Credit Cost Disclosure Statement," hereinafter referred to as "Disclosure Statement."

By and through the use of the Disclosure Statement, respondent:

1. Failed to disclose the sum of payments scheduled to repay the indebtedness, using the term "total of payments" as required by Section 226.8(b) (3) of Regulation Z.

2. Failed to disclose the total amount of the finance charge, with descriptions of each amount included, using the term "finance charge," as required by Section 226.8(d) (3) of Regulation Z.

3. Failed to disclose a description of any penalty charge that may be imposed for prepayment of the principal of the obligation with an explanation of the method of computation of such penalty and the conditions under which it may be imposed, as required by Section 226.8(b)(6) of Regulation Z.

4. Failed to use the term "amount financed" to describe the amount of credit extended, including all charges, individually itemized, which are included in the amount of credit extended but which are not part of the finance charge, as required by Section 226.8(d) (1) of Regulation Z.

PAR. 5. By and through the use of promissory notes secured by first mortgages not for the purposes of acquiring a dwelling and by second mortgages the respondent retains, creates, or acquires a security interest, as "Security Interest" is defined in Section 226.2(gg) of Regulation Z, in real property which is used or expected to be used as the principal residence of the purchaser. Retention or acquisition of these security interests gives customers who are extended consumer credit as "Consumer Credit" is defined in Section 226.2(p), of Regulation Z, the right to rescind the transaction until midnight of the third business day following the date of consummation of the transaction or the date of delivery of all disclosures required under this section and all other material disclosures required by Regulation Z, whichever is later, pursuant to Section 226.9(a) of Regulation Z.

By and through the above-described acts and practices respondent has in many instances since July 1, 1969:

1. Failed to furnish customers with two copies of a notice of the opportunity to rescind in the manner and form required by Section 226.9(b) of Regulation Z.

2. Failed to set forth the "Effect of rescission," as set forth by Section 226.9(d) of Regulation Z, in the manner and form required by Section 226.9(b) of Regulation Z.

PAR. 6. In the ordinary course of its business as aforesaid, respondent causes to be published advertisements as the term "advertisement" is defined in Regulation Z. These advertisements aid, promote or assist, directly or indirectly, extensions of consumer credit.

By and through the use of the advertisements, respondent:

States the amount of the loan, the number, amount, and period of payments scheduled to repay the indebtedness if the credit is extended, and the amount of the finance charge expressed as an annual percentage rate without also stating the following item in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) of Regulation Z:

The total of payments in the loan transaction.

PAR. 7. Pursuant to Section 103(q) of the Truth in Lending Act, respondent's aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondent has thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Boston Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Truth in Lending Act and the implementing regulation promulgated thereunder and violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of such agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its

charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent East Providence Credit Union is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island and Providence Plantations with its principal office and place of business located at 15 Circle St., East Providence, Rhode Island.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent East Providence Credit Union, a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension of consumer credit or advertisement to aid, promote or assist, directly or indirectly, any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. 226) of the Truth in Lending Act (Pub. Law 90–321, 15 U.S.C. 1601, *et seq.),* do forthwith cease and desist from:

1. Failing to disclose the sum of payments scheduled to repay the indebtedness, using the term "total of payments," as required by Section 226.8(b)(3) of Regulation Z.

2. Failing to disclose the total amount of the finance charge, with description of each amount included, using the term "finance charge," as required by Section 226.8(d)(3) of Regulation Z.

3. Failing to provide a description of any penalty charge that may be imposed for prepayment of the principal with an explanation of the method of computation of such penalty and the conditions under which it may be imposed, as required by Section 226.8(b) (6) of Regulation Z.

4. Failing in any transaction in which respondent retains or acquires a security interest in real property which is used or expected to be used as the principal residence of the customer, to provide customers with two copies of the "Notice of Opportunity to Rescind" in the manner and form required by Section 226.9 of Regulation Z.

5. Failing to use the term "amount financed" to describe the amount of credit extended, including all charges, individually

itemized, which are included in the amount of credit extended but which are not part of the finance charge, as required by Section 226.8(d) (1) of Regulation Z.

6. Representing in any advertisement, directly or by implication, the amount of any installment payment, the dollar amount of any finance charge, the number of installments or the period of repayment, or that there is no charge for credit, unless all of the following items are clearly and conspicuously stated, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d) (2) of Regulation Z:

(a) the amount of the loan;

(b) the number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;

(c) the amount of the finance charge expressed as an annual percentage rate; and

(d) the total of payments.

7. Failing, in any consumer credit transaction or advertisement, to make all disclosures determined in accordance with Sections 226.4 and 226.5 of Regulation Z at the time and in the manner, form and amount required by Sections 226.6, 226.8, 226.9, and 226.10 of Regulation Z.

It is further ordered, That respondent deliver a copy of this order to cease and desist to all present and future personnel of respondent now or hereafter engaged in the consummation of any extension of consumer credit or in any aspect of the preparation, creation, or placing of advertising, and that respondent secure a signed statement acknowledging receipt of said order from each said person.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondent herein shall within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

PUBLIC RELATIONS SOCIETY OF AMERICA, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2907. Complaint, Oct. 27, 1977—Decision, Oct. 27, 1977

This consent order, among other things, requires a New York City trade association to cease promulgating rules that affect fee arrangements or business solicitations between members of the association and their clients and prospective clients.

Appearances

For the Commission: *Michele F. Crown.*

For the respondent: *Francis K. Decker, Forsyth, Decker, Murray & Hubbard,* New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that Public Relations Society of America, Inc., a corporation subject to the jurisdiction of the Commission, has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and it appearing that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

1. Respondent, Public Relations Society of America, Inc. ("PRSA"), is a not-for-profit membership corporation organized and existing under the laws of the State of New York, with its principal office located at 845 Third Ave., New York, New York.

2. PRSA is a trade association formed for the purposes, *inter alia,* of providing a forum for the interchange of ideas and information between members, to require adherence by members to certain standards of conduct, and to promote the business of public relations and those who practice it to business, professional and other groups, and to the public.

3. Respondent is a membership organization composed of approximately 8,400 persons. Many PRSA members are engaged in the business of providing public relations services for a fee. PRSA members may, and often do, upon successful completion of an examination given by respondent, receive accreditation and may, and often do, use the acronym "APR" after their name to indicate such accreditation.

4. The acts and practices of PRSA and its members are in or affect

commerce as "commerce" is defined in the Federal Trade Commission Act.

5. For many years up to and including the present, PRSA and its members have engaged in a combination, conspiracy and common course of action to restrain the aforesaid interstate commerce. This combination has consisted of a continuing agreement and understanding among PRSA and its members, the substantial terms of which have been and are:

(a) That PRSA adopt, publish and disseminate a code of professional standards containing a provision that restricts the manner in which members of PRSA may set their fees, including a prohibition against proposing or entering into contingent fee arrangements with clients for the payment of services.

(b) That PRSA adopt, publish and disseminate a code of professional standards containing a provision that restricts the solicitation of clients by PRSA members including restrictions on the solicitation of clients of other members.

(c) That the members of PRSA abide by said provisions of the code of professional standards.

(d) That PRSA and its members police said provisions of the code of professional standards.

6. PRSA and its members have done those things which, as alleged in Paragraph 5(a) – (d), they agreed to do, for the purpose of effectuating the aforesaid combination, conspiracy and common course of action.

7. As a result of the acts and practices alleged in Paragraphs 5 and 6:

(a) Prices of members' services have been or have a dangerous tendency to be tampered, stabilized, fixed or otherwise interfered with;

(b) Price competition among the members of PRSA in the sale of their services has been or has a dangerous tendency to be suppressed or eliminated;

(c) Competition between public relations practitioners in the provision of such services has been or has a dangerous tendency to be hindered, restrained, foreclosed or frustrated;

(d) Barriers have been or have a dangerous tendency to be raised with respect to the entry of new public relations practitioners;

(e) Clients requiring the services offered by members of PRSA have been deprived of the benefits of free and open competition in the sale of such services.

8. The combination, conspiracy, and common course of action described above are unfair methods of competition and unfair acts or

practices that constitute violations of Section 5(a) of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of Section 5 of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent, Public Relations Society of America, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 845 Third Ave., New York, New York.

2. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondent, respondent's officers, directors, agents, employees, successors and assigns, cease and desist from adopting, disseminating, continuing or otherwise having in effect any

code of ethics, rule, bylaw, resolution, policy statement, or interpretation thereof, which prohibits or limits in any way the manner in which members may arrange their fees with clients or prospective clients for payment of services; or which prohibits or restricts any communication to clients or prospective clients with respect to the arrangement of fees.

II

It is further ordered, That respondent, respondent's officers, directors, agents, employees, successors and assigns, cease and desist from adopting, disseminating, continuing, or otherwise having in effect any code of ethics, rule, bylaw, resolution, policy statement, or interpretation thereof, which prohibits or restricts a member from soliciting, negotiating, or entering into a business relationship with a prospective client.

III

It is further ordered, That the respondent corporation shall within 60 days from the date of service of this order, send a copy of this order to each chapter of the society in the United States, and cause the publication of this order in the *PRSA National Newsletter* and send a copy thereof to each current member of respondent.

IV

It is further ordered, That respondent notify the Commission at least 30 days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

V

It is further ordered, That Public Relations Society of America, Inc. shall, within sixty (60) days after the effective date of this order, file with the Commission a written report showing in detail the manner and form of its compliance with each of the provisions of the order.

IN THE MATTER OF

ZAYRE CORP.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2908. Complaint, Oct. 27, 1977 — Decision, Oct. 27, 1977

This consent order, among other things, requires a Framingham, Mass. operator of a discount department store chain to cease failing to have, in each store covered by advertisements, all advertised items available for sale at or below advertised price, in reasonably sufficient quantities to meet anticipated demands; to conspicuously post advertisements and prescribed notices at store entrances and checkout counters; maintain business records for a three-year period; and institute a surveillance program to ensure that its stores' business practices conform to the terms of this order.

Appearances

For the Commission: *Harold F. Moody.*

For the respondent: *Newton A. Lane, Nathanson & Rudofsky,* Boston, Mass.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Zayre Corp., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereto would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Zayre Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with an office and principal place of business located at 770 Cochituate Road, Framingham, Massachusetts.

PAR. 2. Respondent and its subsidiary corporations are now, and for some time last past have been engaged in the operation of a chain of retail discount department stores. There are presently approximately 250 department stores in respondent's chain, located throughout most states east of the Mississippi River. Its volume of business has

been and is substantial. In the operation of its retail discount department stores, respondent offers to its customers an extensive line of clothing, hard goods and other general merchandise. Many of said products offered for sale and sold are purchased from a large number of independent suppliers located throughout the United States.

PAR. 3. In the course and conduct of its business, as aforesaid, respondent now causes, and for some time last past has caused, directly or indirectly, the aforesaid clothing, hard goods and other general merchandise to be shipped and distributed from the aforesaid sources of supply either directly to its retail stores or to its distribution centers and thereafter to its retail stores, many of which are located in various states other than the state of origination, distribution or storage of said products. In the further course and conduct of its business respondent transmits contracts, business correspondence, monies and other documents from its stores, offices and divisions located in various states to others of its stores, offices and divisions located in other states. In the further course and conduct of its business respondent disseminates advertisements in newspapers of interstate circulation and in broadcast media, which broadcasts are received in states other than those of origination. Respondent maintains and at all times mentioned herein has maintained substantial business in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. In the course and conduct of its business, respondent disseminates and causes to be disseminated certain advertisements. In said advertisements respondent makes certain statements and representations with respect to the terms and conditions under which various items of merchandise will be sold to members of the public. The terms and conditions include descriptions or depictions of items of merchandise, their prices, time periods and geographical areas.

PAR. 5. By disseminating or causing to be disseminated in various areas of the United States served by respondent's retail stores such advertisements, respondent has represented, directly or by implication, that in those stores covered by such advertisements, during the effective period of the advertised offers, the items listed or depicted in such advertisements would be readily available for sale to customers, and readily and conspicuously, available for sale at or below the advertised price; and by failing to have had, in every instance, each of the advertised items readily available for sale to customers and readily and conspicuously available for sale at or below the advertised price, said representations as referred to herein were false,

misleading and deceptive, and respondent has engaged in unfair acts and practices.

PAR. 6. In the course and conduct of its business and at all times referred to herein, respondent has been and now is in substantial competition in or affecting commerce, with corporations, partnerships, firms and individuals in the purchase, sale and distribution of clothing, hard goods and general merchandise.

PAR. 7. The use by respondent of the aforesaid unfair and false, misleading and deceptive representations, acts and practices has had the capacity and tendency to mislead members of the purchasing public, and to induce such persons to go to respondent's stores and to purchase from respondent items other than the advertised items and the advertised products at prices in excess of those advertised.

PAR. 8. The aforesaid acts and practices of respondent as herein alleged were all to the prejudice and injury of the public and of respondent's competitors and constituted unfair and deceptive acts and practices in or affecting commerce, and unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Boston Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by the respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission

hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Zayre Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with a principal office located at 770 Cochituate Road, Framingham, Massachusetts.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Zayre Corp., its successors and assigns, and its officers, agents, representatives and employees directly or through any corporation, subsidiary, division or other device, do forthwith cease and desist from representing in any advertisement, by any means, that any product is available for sale to the public at its Zayre department stores at any price unless:

1. Each advertised item is readily available for sale to the public in the selling area of each store covered by the advertisement at or below the advertised price; and

2. Each advertised item, which is usually and customarily individually marked with a price, is individually, clearly, and conspicuously marked with a price which is at or below the advertised price;

provided, however,

(a) An item shall be deemed readily available for sale to the public, although not in the selling area of each store covered by the advertisement, if a clear and conspicuous notice is posted in the area where the item is regularly displayed stating that the item is in stock or, in the case of an item which is customarily delivered, in the warehouse customarily servicing said store, and may be obtained upon request, and said item is furnished on request;

(b) An item shall not be deemed unavailable if respondent maintains and furnishes or makes available for inspection and copying upon the request of the Federal Trade Commission, such records as will show that: (i) the advertised items were delivered to its stores in quantities sufficient to meet reasonably anticipated demand but were "sold out," or the advertised items were advertised with a limit on the available quantity thereof in each store and said items were delivered to the stores in the advertised quantities but were "sold out," or (ii) the advertised items were ordered but not delivered

due to circumstances beyond respondent's reasonable control, and that, upon knowledge of such nondelivery, respondent acted immediately to contact the media to revise the advertisement or proposed advertisement to reflect the limited availability or unavailability of each advertised item and, if revision of the advertisement was not reasonably possible, respondent immediately offered to customers on inquiry a "rain check" for each unavailable item which entitled the holder to purchase the item in the near future at or below the advertised price. Respondent may immediately offer to a disappointed customer another item or items of equal or better value at a reduced price which is at or below the advertised price, which the customer may elect to accept in lieu of a "rain check."

Respondent shall be deemed to have shown, although not limited to such a showing, that it delivered an item to a store in quantities sufficient to meet "reasonably anticipated demand," for the purposes of this order, in a particular advertisement period if it maintains records showing that it had available that item in its stores during that advertisement period in quantities equal to or greater than the quantities of that item sold by its stores during the last preceding comparable advertisement period.

The phrase, "quantities of that item sold by its stores during the . . . advertisement period," means the sum of the number of units in the closing inventory of the stores after closing hours on the night before the first day of the advertisement period, *plus* the number of units delivered to the stores during the advertisement period, *plus* the number of "rain checks" issued for that item during the advertisement period, and *minus* the number of units in the closing inventory of the stores after closing hours on the last day of the advertisement period.

The phrase, "last preceding comparable advertisement period" means, for a particular item, the last preceding advertisement period (during which the item was advertised) that is most comparable to the particular advertisement period, considering the time of the year, the week of the month, weather conditions, the nature of the item, the amount of the price reduction, the location of the advertisement for the item with reference to the advertisement as a whole, the type size of the advertisement for the item, the availability of a coupon, the location of the product within the stores, and any other relevant factors affecting a customer's buying habits.

If respondent or any of its employees, agents or representatives are not advised of an alleged instance of unavailability through any source including the Federal Trade Commission within three months of its occurrence, it shall be presumed that the records called for by

this proviso were in the possession of respondent showing (i) or (ii), *unless* clear and convincing evidence establishes the contrary.

(c) If any advertisement includes two or more stores, a product shall not be deemed unavailable or mispriced if such advertisement contains a specific exemption with respect to said product and identifies each store in which the product is not available.

(d) If any advertised item is placed for sale in a large stack, pyramid or other special display containing a great number of such items, all of the items need not be individually marked at or below the advertised price, if the items not marked individually at or below the advertised price are so situated that it would be difficult or impossible for a customer to select an unmarked item.

(e) An advertised item which is usually and customarily individually marked with a price, need not be marked with the advertised price but may remain marked at its regular price if both (i) a conspicuous sign at the site of the display of such item clearly discloses that the item is, "as advertised" or "on sale" or words of similar import as appropriate, clearly discloses the advertised price, and clearly states that the cashiers know the sale price; and (ii) the cashiers do in fact have a written list containing such sale price, have been instructed to charge the sale price for said item, and do in fact charge the customer the sale price.

It is further ordered, That for a period of two (2) years from the date this order becomes final, during the effective period of each advertisement which represents that any product is available at respondent's department stores, respondent shall post conspicuously (a) at or near each doorway affording entrance to the public a copy of the advertisement and, (b) at or near each door affording entrance to the public and at or near the place where customers pay for merchandise, a notice stating that:

> It is our policy to have all items advertised readily available for sale at or below the advertised price. If any advertised item that you wish to purchase is unavailable, except where quantity limitations are indicated in the advertisement, we will offer you a rain check which will enable you to purchase the item, or an item of comparable or better value, at or below the advertised price in the near future. We may immediately offer you a similar product of equal or better value which you may purchase at or below the advertised price, but you may choose a rain check if you wish.
>
> If you have any questions, please speak to the store manager or customer service manager.

It is further ordered, That for a period of two (2) years from the date this order becomes final respondent shall cause the following statement to be clearly and conspicuously set forth in each written

advertisement which represents that items are available for sale at a stated price at any of its department stores.

> It is our policy to have each of these advertised items readily available for sale at or below the advertised price in each Zayre store, except as specifically noted in this ad.

It is further ordered, That:

(1) Respondent shall forthwith deliver a copy of this order to each of its operating divisions and to each of its present and future officers and other personnel in its organizations down to the level of and including assistant store managers who, directly or indirectly, have any supervisory responsibilities as to individual department stores of respondent, or who are engaged in any aspect of preparation, creation, or placing of advertising, and that respondent shall secure a signed statement acknowledging receipt of said order from each such person;

(2) Respondent shall institute and maintain a program of continuing surveillance adequate to reveal whether the business practices of each of its department stores conform to this order, and shall confer with any duly authorized representative of the Commission pertaining to such program when requested to do so by a duly authorized representative of the Commission;

(3) Respondent shall, for a period of three (3) years subsequent to the date of this order:

(a) Maintain business records which show the efforts taken to insure continuing compliance with the terms and provisions of this order;

(b) Grant any duly authorized representative of the Federal Trade Commission access to all such business records;

(c) Furnish to the Federal Trade Commission copies of such records which are requested by any of its duly authorized representatives;

(4) Respondent shall, all other provisions of this order notwithstanding, on or before each of the first three (3) anniversary dates on which this order becomes final file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order in the preceding year.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the respondent, which may affect compliance obligations arising out of this order.

It is further ordered, That the respondent herein shall within sixty

(60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

THE RAYMOND LEE ORGANIZATION, INC., ET AL.

Docket 9045. Interlocutory Order, Oct. 31, 1977

Denial of respondents' request for reconsideration of prior denial of extension to file answer to motion for leave to file amicus brief.

ORDER DENYING RESPONDENTS' REQUEST FOR RECONSIDERATION OF ORDER DENYING REQUEST FOR AN EXTENSION OF TIME FOR FILING AN ANSWER

By letter received October 18, 1977, Mr. Malcolm I. Lewin, attorney representing The Raymond Lee Organization, Inc. and Raymond Lee, requested the Commission grant an extension of time for filing an answer in opposition to a motion for leave to file a brief of an amicus curiae.

The Commission, assuming arguendo that respondents had a right to file an answer under Rule 3.52(h), denied respondents' motion noting that the specified time within which the answer should have been forthcoming had expired.

Now, attorneys for respondents, by letter received October 25, 1977, request that the Commission reconsider its order denying their request for an extension of time.

Not addressing the question whether the respondents have a right to answer, the Commission finds no reason to reconsider the above order.

Moreover, the Commission, in its discretion, reading respondents' answer finds nothing therein to change its decision granting amici leave to file a brief. Respondents' major concern is that amici will introduce factual material not contained in the record of this proceeding. This fear is groundless, however, as the Commission undoubtedly would strike those portions of the brief which attempt to introduce new evidence about the case. Accordingly,

It is ordered, That said motion be, and it hereby is, denied.

IN THE MATTER OF

MINNESOTA STATE MEDICAL ASSOCIATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2909. Complaint, Oct. 31, 1977 — Decision, Oct. 31, 1977

This consent order, among other things, requires a St. Paul, Minn. medical association and its component societies, to cease publishing, distributing or contributing to the development of relative value scales and monetary conversion factors which tend to establish prices or otherwise influence fees for medical and surgical services. Further, respondents are required to withdraw such material which has already been published or circulated, and to send copies of the complaint and order to their member societies.

Appearances

For the Commission: *Lawrence E. Gray* and *Judith A. Moreland.*

For the respondents: *Dorsey, Windhorst, Hannaford, Whitney & Halladay,* Minneapolis, Minn.

COMPLAINT

Pursuant to the provision of the Federal Trade Commission Act, as amended, 15 U.S.C. 41, *et. seq.,* and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Minnesota State Medical Association and the county and district medical societies (as named in the caption hereof) which are components of the Minnesota State Medical Association have violated the provisions of Section 5 of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. Respondent, the Minnesota State Medical Association ("MSMA"), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at 101 East Fifth St., St. Paul, Minnesota.

PAR. 2. The respondent county and district medical societies are chartered by MSMA and are referred to as component societies. Membership in MSMA is available only through membership in a component society, and all members of component societies are required to be members of MSMA.

PAR. 3. Respondent, Clay-Becker County Medical Society, is a corporation organized, existing and doing business under and by

virtue of the laws of the State of Minnesota, with its principal office located at 124 E. Frazee St., Detroit Lakes, Minnesota.

Respondent, The Freeborn County Medical Society, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at 210 N. St. Mary, Albert Lea, Minnesota.

Respondent, Headwaters Medical Society, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at Bemidji Clinic, Ltd., Bemidji, Minnesota.

Respondent, Hennepin County Medical Society, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at 20 S. Washington Ave., Minneapolis, Minnesota.

Respondent, McLeod County Medical Society, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at 126 N. Franklin, Hutchinson, Minnesota.

Respondent, Minnesota Southwestern Medical Society (d/b/a Blue Earth County Medical Society), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at Box 589, Lake Crystal, Minnesota.

Respondent, Ramsey County Medical Society, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at 3220 Bellaire Ave., White Bear Lake, Minnesota.

Respondent, Scott-Carver County Medical Society, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at Shakopee Medical Center, Shakopee, Minnesota.

Respondent, Stearns-Benton County Medical Society, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at Doctors' Park, St. Cloud, Minnesota.

Respondent, Steele County Medical Society, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at 920 S. Cedar, Owatonna, Minnesota.

Respondent, Upper Mississippi Medical Society, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at 302 3rd Ave., N.E., Little Falls, Minnesota.

Respondent, Wabasha County Medical Society, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at Community Clinic, Wabasha, Minnesota.

Respondent, Winona County Medical Society, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at Winona Clinic, Winona, Minnesota.

Respondent, Blue Earth Valley Medical Society, is an unincorporated association having its principal office at 117 W. 5th St., Blue Earth, Minnesota.

Respondent, Brown County Medical Society, is an unincorporated association having its principal office at New Ulm Medical Clinic, New Ulm, Minnesota.

Respondent, Camp Release District Medical Society, is an unincorporated association having its principal office at Dawson Clinic, Dawson, Minnesota.

Respondent, East Central Minnesota Medical Society, is an unincorporated association having its principal office at Chisago Lakes Medical Center, Chisago City, Minnesota.

Respondent, Goodhue County Medical Society, is an unincorporated association having its principal office at Interstate Clinic, Red Wing, Minnesota.

Respondent, Lyon-Lincoln County Medical Society, is an unincorporated association having its principal office at 508 E. College Drive, Marshall, Minnesota.

Respondent, Mid Minnesota Medical Society, is an unincorporated association having its principal office at Willmar Medical Center, 101 Willmar Ave., Willmar, Minnesota.

Respondent, Mower County Medical Society, is an unincorporated association having its principal office at Suite 115, 100 Building, Austin, Minnesota.

Respondent, Nicollet-Le Sueur County Medical Society, is an unincorporated association having its principal office at 622 Sunrise Drive, St. Peter, Minnesota.

Respondent, Park Region District and County Medical Society, is an unincorporated association having its principal office at 615 S. Mill, Fergus Falls, Minnesota.

Respondent, Range Medical Society, is an unincorporated association with its principal office at 429 3rd St., International Falls, Minnesota.

Respondent, Red River Valley Medical Society, is an unincorporat-

ed association with its principal office at R.R. #2, Box 72, E. Grand Forks, Minnesota.

Respondent, Rice County Medical Society, is an unincorporated association with its principal office at 924 N.E. First St., Faribault, Minnesota.

Respondent, St. Louis County Medical Society, is an unincorporated association with its principal offices at 302 Medical Arts Building, Duluth, Minnesota.

Respondent, Sibley County Medical Society, is an unincorporated association with its principal office at Arlington Clinic, Arlington, Minnesota.

Respondent, Southwestern Minnesota Medical Society, is an unincorporated association with its principal office at 215 N. Cedar, Luverne, Minnesota.

Respondent, Wakota Medical Society, is an unincorporated association having its principal office at 305 S. Greeley St., Stillwater, Minnesota.

Respondent, Waseca County Medical Society, is an unincorporated association with its principal office at 312 N. Main, Janesville, Minnesota.

Respondent, West Central Minnesota Medical Society, is an unincorporated association with its principal office at 23 Montana, Morris, Minnesota.

Respondent, Wright County Medical Society, is an unincorporated association with its principal office at 207 First St., S., Buffalo, Minnesota.

Respondent, Zumbro Valley Medical Society, is an unincorporated association with its principal office at Olmsted Medical Group, Rochester, Minnesota.

PAR. 4. MSMA and the component societies have approximately 5,000 members. Active membership in MSMA and the component societies is open to physicians licensed to practice medicine in the State of Minnesota or in any other state of the District of Columbia, persons authorized by law to act as resident physicians in the State of Minnesota, and persons engaged within the State of Minnesota in an activity allied to medicine which does not require licensure from the State of Minnesota. The membership also includes affiliate members, persons distinguished for their services in a field of science allied to medicine or in the field of public health, and honorary members. Affiliate and honorary members may not vote or hold office in MSMA.

Members of the component societies elect representatives to the MSMA House of Delegates, which constitutes the governing body of

MSMA. The House of Delegates elects councilors and officers who together constitute the Council of MSMA, which manages the affairs of MSMA between sessions of the House of Delegates.

PAR. 5. Active members are divided into the following classes:

(a) Regular active members are those members who pay full dues and assessments of MSMA;

(b) Life active members are regular active members who have reached the age of 70 years and have been members of MSMA or a component society for 40 years;

(c) Service active members are members on duty in the armed forces or the public health service of the United States or who are engaged in medical missionary work outside the United States;

(d) Associate active members have retired from the active practice of medicine or, because of disability, are unable to engage in the active practice of medicine and are not engaged in the active practice of medicine;

(e) Residency active members are engaged in an approved residency program;

(f) Intern active members are engaged in an approved internship program; and

(g) Medical student active members are studying within the State of Minnesota for the degree of Doctor of Medicine.

PAR. 6. Many members of MSMA and of the component societies are licensed physicians engaged in the private practice of medicine and surgery and derive substantial portions of their professional income from fees for medical and surgical procedures charged directly to patients or to insurers.

PAR. 7. The acts and practices of MSMA and the component societies are in or affect commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 8. Starting in 1959 and continuing through the present, MSMA prepared, published, and circulated to its members and others two editions of a document entitled "Minnesota Relative Value Index" which set forth in nonmonetary units comparative numerical values for procedures performed and services rendered by physicians and other health care practitioners. Such documents are commonly referred to as "relative value scales." Each value is convertible into a monetary fee by the application to it of a dollar conversion factor. Both editions of the Minnesota Relative Value Index have been supplemented or modified from time to time.

PAR. 9. At various times since 1961 and continuing until the present, component societies have adopted, published, circulated, suggested, or recommended to their individual members conversion

factors applicable or prospectively applicable to the Minnesota Relative Value Index or to other relative value scales.

PAR. 10. The preparation, publication, and circulation by MSMA of the Minnesota Relative Value Index have the effect of establishing, maintaining, or otherwise influencing the fees which physicians and other health care practitioners charge for their professional services, and are in violation of Section 5 of the Federal Trade Commission Act, as amended.

PAR. 11. The adoption, publication, circulation, suggestion, and recommendation by component societies to their individual members of conversion factors applicable or prospectively applicable to the Minnesota Relative Value Index or to other relative value scales have the effect of establishing, maintaining, or otherwise influencing the fees which physicians and other health care practitioners charge for their professional services, and are in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of Section 5 of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the agreement and having provisionally accepted same and placed it on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of the Commission's Rules, now in further conformity with the procedure provided by Section 2.34 of its Rules hereby issues its decision in disposition of the proceeding against the above-named respondents, makes the following jurisdictional findings, and enters the following findings and order:

1. Respondent, Minnesota State Medical Association ("MSMA"),

is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at 101 East Fifth St., St. Paul, Minnesota.

2. The component societies as listed and further described below are corporations and unincorporated associations chartered by MSMA on a county or district basis.

Respondent, Clay-Becker County Medical Society, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at 124 E. Frazee St., Detroit Lakes, Minnesota.

Respondent, The Freeborn County Medical Society, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at 210 N. St. Mary, Albert Lea, Minnesota.

Respondent, Headwaters Medical Society, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at Bemidji Clinic, Ltd., Bemidji, Minnesota.

Respondent, Hennepin County Medical Society, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at 20 S. Washington Ave., Minneapolis, Minnesota.

Respondent, McLeod County Medical Society, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at 126 N. Franklin, Hutchinson, Minnesota.

Respondent, Minnesota Southwestern Medical Society (d/b/a Blue Earth County Medical Society), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at Box 589, Lake Crystal, Minnesota.

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Respondent, Stearns-Benton County Medical Society, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at Doctors' Park, St. Cloud, Minnesota.

Respondent, Steele County Medical Society, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at 920 S. Cedar, Owatonna, Minnesota.

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Respondent, Camp Release District Medical Society, is an unincorporated association having its principal office at Dawson Clinic, Dawson, Minnesota.

Respondent, East Central Minnesota Medical Society, is an unincorporated association having its principal office at Chisago Lakes Medical Center, Chisago City, Minnesota.

Respondent, Goodhue County Medical Society, is an unincorporated association having its principal office at Interstate Clinic, Red Wing, Minnesota.

Respondent, Lyon-Lincoln County Medical Society, is an unincorporated association having its principal office at 508 E. College Drive, Marshall, Minnesota.

Respondent, Mid Minnesota Medical Society, is an unincorporated association having its principal office at Willmar Medical Center, 101 Willmar Ave., Willmar, Minnesota.

Respondent, Mower County Medical Society, is an unincorporated association having its principal office at Suite 115, 100 Building, Austin, Minnesota.

Respondent, Nicollet-Le Sueur County Medical Society, is an unincorporated association having its principal office at 622 Sunrise Drive, St. Peter, Minnesota.

Respondent, Park Region District and County Medical Society, is an unincorporated association having its principal office at 615 S. Mill, Fergus Falls, Minnesota.

Respondent, Range Medical Society, is an unincorporated association with its principal office at 429 3rd St., International Falls, Minnesota.

Respondent, Red River Valley Medical Society, is an unincorporated association with its principal office at R.R. #2, Box 72, E. Grand Forks, Minnesota.

Respondent, Rice County Medical Society, is an unincorporated association with its principal office at 924 N.E. First St., Faribault, Minnesota.

Respondent, St. Louis County Medical Society, is an unincorporated association with its principal office at 302 Medical Arts Building, Duluth, Minnesota.

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Respondent, Wakota Medical Society, is an unincorporated association with its principal office at 305 S. Greeley St., Stillwater, Minnesota.

Respondent, Waseca County Medical Society, is an unincorporated association with its principal office at 312 N. Main, Janesville, Minnesota.

Respondent, West Central Minnesota Medical Society, is an unincorporated association with its principal office at 23 Montana, Morris, Minnesota.

Respondent, Wright County Medical Society, is an unincorporated association with its principal office at 207 First St., S., Buffalo, Minnesota.

Respondent, Zumbro Valley Medical Society, is an unincorporated association with its principal office at Olmsted Medical Group, Rochester, Minnesota.

3. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over the respondents, and the proceeding is in the public interest.

ORDER

I

A. The term "relative value scale" means any list, compilation, or schedule which sets forth comparative numerical values for procedures performed and/or services rendered by physicians and other health care practitioners, without regard to whether those values are expressed in monetary or non-monetary terms.

B. The term "conversion factor" means any monetary value multiplier used or intended to be used to convert non-monetary values in a relative value scale to monetary fees.

C. The term "MSMA" means the Minnesota State Medical Association.

D. The term "component society" means a county or district medical society chartered by MSMA.

E. The term "effective date of this order" means the date of service of this order.

II

It is ordered, That MSMA and each of the component societies, the successors, or assigns, and the officers, agents, representatives and employees of each of them, directly or through any corporation, subsidiary, division or other device, shall:

A. Cease and desist from directly or indirectly initiating, originating, developing, publishing, or circulating the whole or any part of any proposed or existing relative value scale(s);

B. Cease and desist from directly or indirectly advising in favor of or against the use of, or contributing to the whole or any part of any proposed or existing relative value scale(s);

C. Cease and desist from directly or indirectly initiating, originating, developing, publishing, circulating, adopting, contributing to, recommending, suggesting, or advising in favor of or against the use of, any and all conversion factors applicable or prospectively applicable to the whole or any part of any existing or proposed relative value scale(s); and

D. Permanently cancel, repeal, abrogate, and withdraw any and all relative value scales and conversion factors which any of them has heretofore initiated, originated, developed, published, circulated, adopted, advised in favor of, recommended, suggested, or contributed to;

Provided, however, that nothing contained in this order shall prohibit MSMA or any component society, or any officer, agent,

representative, or employee of MSMA or any component society from furnishing testimony to any government body, committee or instrumentality, or from furnishing to any third party or government body, committee, or instrumentality such information as may be requested; to the extent, however, that such information or testimony may bear directly or indirectly on compensation levels for procedures performed and/or services rendered by physicians and other health care practitioners, it shall be limited to historical data, free of editing or interpretation, and shall be completely described as to methodology; and

Provided further, that nothing contained in this order shall prohibit MSMA or any component society from initiating, originating, developing, publishing, circulating, adopting, contributing to, recommending, suggesting, or advising in favor of or against the use of any list or compilation of standardized terminology describing procedures performed and/or services rendered by physicians and other health care practitioners, so long as such list or compilation does not directly or indirectly set forth absolute or comparative numerical values for any such procedures or services.

III

It is further ordered, That MSMA shall, within thirty (30) days after the effective date of this order, distribute by mail a copy of the Commission's complaint and order in this matter, as well as a letter, in the form shown as Appendix "A" to this order, to each of its members (except service active members and associate active members) and to each other recipient known to it of any edition or version of the Minnesota Relative Value Index, instructing such members and recipients to return to MSMA all copies of the Minnesota Relative Value Index in their possession, including all supplements, addenda, and additions thereto.

IV

It is further ordered, That, subsequent to the effective date of this order, MSMA shall not charter any component society or other medical society unless the charter of such component society or other medical society incorporates in substance the prohibitions and requirements contained in Paragraph II of this order.

V

It is further ordered, That MSMA and each component society shall notify the Commission at least thirty (30) days prior to any proposed

change in its organization which might affect compliance obligations under this order, such as, but not limited to, dissolution, the emergence of a successor corporation, association, or society, and the creation and/or dissolution of component societies.

VI

It is further ordered, That MSMA and each component society shall, within sixty (60) days after the effective date of this order, file with the Commission a written report showing in detail the manner and form of its compliance with each of the provisions of the order.

VII

Nothing in this order shall be construed to exempt MSMA or any component society from complying with the antitrust laws or the Federal Trade Commission Act. The fact that any activity is not prohibited by this order shall not bar a challenge to it under such laws.

APPENDIX A

(MSMA Letterhead)

TO: MSMA members and recipients of the Minnesota Relative Value Index

As you may be aware, the FTC has been investigating activities of MSMA and the component societies involving the development and use of the Minnesota Relative Value Index. The Council of the Association and the component societies no longer desire to continue such activities and have entered into an agreement with the Federal Trade Commission to discontinue all Relative Value Index activities.

This agreement resulted in the issuance by the Federal Trade Commission on ——— of a complaint and the entry of a consent order which requires, in essence, that MSMA and the component societies:

(a) cease publishing and participating in the development of relative value indices;

(b) refrain from publishing, recommending, or suggesting dollar conversion factors applicable to relative value indices;

(c) withdraw the relative value indices and any conversion factors which have already been published or recommended;

(d) distribute a copy of the complaint and consent order to MSMA members and to every recipient of the Minnesota Relative Value Index; and

(e) instruct all recipients of the Minnesota Relative Value Index to return them, with all supplements, addenda, and additions thereto, to MSMA.

The complaint of the FTC alleges basically that the MSMA Relative Value Index and the adoption of uniform conversion factors have the effect of influencing fees charged by physicians. However, the consent agreement with the FTC states that it does not constitute an admission by MSMA or any component society that the law has been violated, and that it is for settlement purposes only.

In accordance with the provisions of the FTC's order, you are to cease using and are to return all copies of any edition of the Minnesota Relative Value Index in your possession.

The proper mailing address is:

Minnesota State Medical Association
101 East Fifth Street
St. Paul, Minnesota 55101

Copies of the FTC's complaint and order are enclosed.

Sincerely,

_____

Chairman of the Council

IN THE MATTER OF

TRANS WORLD ACCOUNTS, INC., ET AL.

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 9059. Complaint, Sept. 30, 1975 — Final Order, Oct. 25, 1977

This order, among other things, requires a Santa Rosa, Calif. debt collection agency to cease misrepresenting the likelihood or imminency of legal action; and to cease using, or placing in the hands of others, materials which simulate telegraphic communications, or which may otherwise mislead debtor recipients as to the nature, import or urgency of such communications.

Appearances

For the Commission: *Ralph E. Stone.*

For the respondents: *Kirt F. Zeigler, Spridgen, Barrett, Achor, Luckhardt, Anderson & James,* Santa Rosa, Calif.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Trans World Accounts, Inc., a corporation, and Floyd T. Watkins, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Trans World Accounts, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 2800 Cleveland Ave., Santa Rosa, California.

Respondent Floyd T. Watkins is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time in the past have been, engaged in the advertising, offering for sale and sale of a service to assist in the collection of alleged delinquent debts. This service consists of the preparation by the respondents of a [2] series

of form notices and letters to be mailed to alleged delinquent debtors at regular intervals.

Two styles of forms have been used in this series: (1) that which is titled TELEGRAM; and (2) that which bears the letterhead of Trans World Accounts, Inc.

PAR. 3. In the course and conduct of their business, respondents are now, and for some time in the past have been, engaged in sending to and receiving from persons, firms and corporations located in various States of the United States, by means of the United States mail, letters, notices, forms and other material for use in the collection of alleged delinquent debts. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said business in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the payment of alleged delinquent debts, the respondents have mailed or caused to be mailed to alleged delinquent debtors various printed forms and other printed material.

Typical and illustrative, but not necessarily all inclusive, of said forms and material are the following:

1. A yellow window envelope on which a return address is printed, with no name. The word TELEGRAM is printed in large black type over the window and on the reverse side.

2. A yellow printed form, styled TELEGRAM designed to be inserted in the envelope described in subparagraph 1 of this paragraph.

PAR. 5. By and through the use of the envelopes and forms described in subparagraphs 1 and 2 of Paragraph Four, the respondents have represented, directly or by implication, that the envelopes and forms are telegraphic communications.

PAR 6. In truth and in fact, the envelopes and forms referred to in Paragraps Four and Five are not telegraphic communications. Rather, they are printed form letters mailed to alleged delinquent debtors, which forms by their color and appearance, styling, printing and format simulate telegraphic communications. By [3] virtue of said simulation, these envelopes and forms mislead the recipient as to their nature, import, purpose and urgency.

Therefore, the use by respondents of said envelopes and forms as set forth in Paragraph Four was and is false, misleading and deceptive.

PAR. 7. In the course and conduct of their business and for the purpose of inducing the payment of alleged delinquent debts, respondents have mailed, or caused to be mailed, to alleged

delinquent debtors various printed forms, letters and other printed material containing certain statements and representations.

Among and typical, but not all inclusive, of such statements and representations are the following:

URGENT - - IMMEDIATELY CONTACT OUR CLIENT AND MAKE ARRANGEMENTS FOR PAYMENT. IMPERATIVE TO AVOID FURTHER ACTION WHICH MAY BE TAKEN AGAINST YOU UNDER PROVISIONS OF STATE STATUTES. IF SETTLEMENT IS NOT MADE WITHIN 5 DAYS AFTER RECEIPT OF THIS TELEGRAM YOU MAY WISH TO CONSULT YOUR ATTORNEY REGARDING YOUR LEGAL LIABILITY. . .

* * * * * * *

YOU ARE HEREBY DIRECTED TO APPEAR AT OUR CLIENT'S OFFICE AT 9:00 A.M. NEXT TUESDAY TO PROTEST LIABILITY OF THE ABOVE CLAIM. FAILURE TO COMPLY MAY RESULT IN IMMEDIATE COMMENCEMENT OF LITIGATION BY OUR CLIENT. IF JUDGMENT IS GRANTED, PROPERTY, INCLUDING MONIES, AUTOMOBILIES, CREDITS AND BANK DEPOSITS NOW IN YOUR POSSESSION, COULD BE ATTACHED.

* * * * * * *

YOU HAVE NOT SATISFIED OUR CLIENT CONCERNING THE ABOVE DEBT AS WE REQUESTED A FEW DAYS AGO. WE STRONGLY URGE YOU TO MAKE PAYMENT DIRECT TO OUR CLIENT WHILE YOU STILL HAVE THE OPPORTUNITY. OUR CLIENT MAY REFER THIS MATTER TO LEGAL COUNSEL WHICH COULD BE TURNED INTO AN IMMEDIATE COURT SUIT. . .

* * * * * * *

YOU HAVE RECEIVED THE BENEFIT OF EARLIER NOTICES FROM THIS OFFICE AND HAVE FAILED TO DISCHARGE YOUR OBLIGATION. WE HEREBY REQUEST VERIFICATION AS TO EMPLOYER'S NAME AND ADDRESS, BANKS WITH WHICH YOU DO BUSINESS, MORTGAGE HOLDER ON HOME, AND LEGAL OWNER OF AUTOMOBILE. THIS INFORMATION IS NECESSARY [4] WHEN FILING SUIT AND IS TO BE FORWARDED IMMEDIATELY TO OUR CLAIMS OFFICE FOR THEIR RECORDS. . .

* * * * * * *

URGENT - - - CONTACT OUR CLIENT IMMEDIATELY AND MAKE ARRANGEMENTS FOR PAYMENT. IMPERATIVE TO AVOID FURTHER ACTION BY THIS OFFICE. IF FULL SETTLEMENT IS NOT MADE WITHIN 48 HOURS AFTER RECEIPT OF THIS NOTICE, OUR CLIENT SUGGESTS YOU CONSULT YOUR ATTORNEY REGARDING LEGAL LIABILITY. MAKE PAYMENT DIRECT TO OUR CLIENT, NOT TO CLAIMS OFFICE OF TRANS WORLD ACCOUNTS, INC.

* * * * * * *

PAR. 8. By and through the use of the aforesaid statements and

representations, and others of similar import and meaning not expressly set out herein, respondents have represented, directly or by implication, that legal action with respect to an alleged delinquent debt is about to be, or may be, initiated during the course of the aforesaid series of form notices and letters.

PAR. 9. In truth and in fact, legal action with respect to an alleged delinquent debt is neither about to be, nor will it be, initiated during the course of the aforesaid series of form notices and letters. On the contrary, while respondents' letter writing service was being used, no legal proceedings were being or would be initiated on the basis of the alleged debtor's failure to respond to respondents' communications.

Therefore, the statements and representations set forth in Paragraphs Seven and Eight were and are false, misleading and deceptive.

PAR. 10. In the course and conduct of their business, and at all times mentioned herein, respondents have been and are now in substantial competition, in commerce, with corporations, firms and individuals engaged in providing services of the same general kind and nature as those provided by respondents.

PAR. 11. The use by respondents of the envelopes and forms as set forth in Paragraph Four hereof, has had the tendency and capacity to mislead and deceive members of the public into the erroneous and mistaken belief that said envelopes and forms are [5] telegraphic communications. Furthermore, the use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had the tendency and capacity to mislead members of the public into the erroneous and mistaken belief that said statements and representations were and are true and to induce the payment of substantial sums of money by reason of said erroneous and mistaken belief.

PAR. 12. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY DANIEL H. HANSCOM, ADMINISTRATIVE LAW JUDGE.

APRIL 7, 1977

I

STATEMENT OF THE CASE

Allegations of Complaint

The complaint in this proceeding alleged that respondents Trans World Accounts, Inc., and Floyd T. Watkins engaged in the sale of a service to assist in the collection of delinquent debts, and charged respondents with using misrepresentations in a series of form notices and letters sent to debtors as part of their service to induce payment. Essentially the complaint charged respondents with sending dunning [2] communications to debtors in a "yellow window envelope" with the work "TELEGRAM" printed in large black type over the window and on the reverse side. The notice inside was alleged to be a "yellow printed form, styled TELEGRAM." The complaint charged that these communications were not telegrams, but simulated telegrams, and because of such simulation, the envelopes and forms misled recipients as to their nature, import, purpose and urgency.

The complaint also alleged that statements in the messages sent to delinquent debtors misrepresented that legal action "is about to be, or may be" taken against the recipient by his creditor, when in actuality legal action with respect to the debt was not initiated during the course of the aforesaid series of form notices and letters. The following are alleged to be typical representations made by respondents in form letters sent to debtors:

> Urgent — Immediately contact our client and make arrangements for payment. Imperative to avoid further action which may be taken against you under provisions of state statutes. . .
>
> You are hereby directed to appear at our client's office at 9:00 A.M. next Tuesday to protest liability of the above claim. Failure to comply may result in immediate commencement of litigation by our client. . .
>
> Our client may refer this matter to legal counsel which could be turned into an immediate court suit. . .
>
> Urgent — Contact our client immediately and make arrangements for payment. Imperative to avoid further action by this office. . .

The complaint charged that the above statements, and others of

similar import, had the tendency to mislead the public as to their truth, and thus to induce payment of substantial sums of money. [3]

Respondents' Answer

Respondents filed answer admitting most of the factual allegations of the complaint, denying most of the substantive allegations, and raising several affirmative defenses. Respondents Trans World Accounts, Inc., and Floyd T. Watkins, admitted that they advertise and sell a service to assist in the collection of delinquent debts, and that part of their service includes the preparation by respondents of a series of form notices and letters to be mailed to delinquent debtors.

Respondents admitted they have mailed to delinquent debtors various printed forms and that the examples of their forms, set forth in the complaint, although incomplete in their descriptions, do describe to some extent the forms and materials used by them. They further admitted that one of their form notice and envelope styles included in its title the word TELEGRAM. However, respondents deny that by using such form they have represented, directly or by implication, that the messages are telegraphic communications. Respondents admitted that the notices to debtors are not telegraphic communications, and denied that they simulate such communications, or mislead recipients as to the nature, import, purpose and urgency of the messages.

Although respondents admitted that the excerpts of messages sent to debtors as set forth in the complaint are typical, but not inclusive, of representations appearing on printed materials prepared and mailed by them, they denied that they have represented, directly or by implication, that legal action is about to be, or may be initiated during the series of letters. In the alternative, respondents denied that, during the course of their letter mailing service, there is no possibility legal proceedings would be initiated if the debtor failed to respond to a communication.

Respondents denied that their service injures the public, or constitutes unfair methods of competition or unfair or deceptive acts or practices [4] in violation of Section 5 of the Federal Trade Commission Act. They denied that their printed forms and letters have the tendency and capacity to mislead the public into believing the notices are telegraphic communications, or to induce the public into payment of substantial sums because of representations in the mailed messages which they denied were false.

Respondents urged the value of their service and asserted that they have never advertised, offered for sale or sold a service to assist

in the collection of anything but actual, due and owing delinquent debts. Nor, they claimed, had their service been used for any purpose but to collect lawful, just and delinquent debts.

In their answer, respondents admitted that they are now and have in the past engaged in sending and receiving materials from persons located in various states by means of the United States mail and that they engage in substantial competition, in commerce, with like firms.

History of the Proceeding

Complaint was served at the end of October 1975. An initial hearing which had been set in the complaint for November 24, 1975 was cancelled. On December 16 the law judge issued an order directing counsel to attempt agreement on a timetable for completion of prehearing matters and a date and place for hearings on the merits. A timetable was agreed upon and established by the law judge's order of January 22, 1976. Hearings on the merits were set for May 10.

Thereafter, discovery was conducted according to the agreed upon timetable with the exception that complaint counsel requested and was granted a week's extension to file final exhibit lists.

On February 23, 1976, counsel supporting the complaint filed a motion for summary decision and respondents were granted time to respond to the motion. Complaint counsel's motion was founded on respondents' admitted use of the telegram format for its series of [5] letters and admitted use of language alleged in the complaint, thus according to complaint counsel, eliminating all factual issues in dispute. Respondents filed their response on March 17 and included a request for oral argument on the motion. They argued that although the language was used as charged, there remained disputed issues of material fact including whether legal action against the debtor as allegedly depicted in the letters was accurate or a misrepresentation. Respondents charged as vague the wording in the proposed order which prohibited the use of materials which "misrepresented the nature, import, purpose or urgency of any communication," and urged the need for oral argument to obtain more specific guidance as to what forms would be acceptable, including such possible formats as "Speedogram," "Lettergram," and "Transogram." Additionally, respondents objected to the disclaimer required by the proposed order to appear on notices sent to debtors to the effect that there would be no suit filed against the debtor until the end of the series of letters. Respondents argued the disclaimer

would be inaccurate, would be confusing to debtors, and would destroy the efficacy of their service.

A pretrial hearing was scheduled and held on March 25. As a result of this oral argument, the law judge concluded there were genuine issues of material fact in dispute. Therefore, the motion for summary decision was denied and the date for evidentiary hearings was reinstated for May 10, 1976.

On April 30, a joint motion was made by the parties to withdraw this matter from adjudication so that the Commission could consider a consent agreement which had been negotiated. The law judge certified the agreement to the Commission and the matter was withdrawn from adjudication on May 18, the hearings scheduled for May 10 having been cancelled. However, the Commission did not accept the proposed consent order and returned the matter for adjudication on September 28.

On receiving notification of this action the undersigned immediately issued an order directing both sides to submit a proposed timetable for further proceedings including a trial date. Hearings on the [6] merits began on January 10, 1977, the earliest date respondents' counsel was available, and concluded after three days of proceedings. Eight witnesses testified including the individual respondent, and the testimony of others was stipulated. The record, consisting of 78 exhibits, many of them multi-paged, and 355 pages of transcript was closed by order of the law judge on January 17, 1977.

This matter is now before the undersigned for decision based upon the allegations of the complaint, the answer, the evidence and the proposed findings of fact, conclusions and briefs filed by all parties. All proposed findings of fact, conclusions and arguments, not specifically found or accepted herein, are rejected. The law judge having considered the entire record, and all the contentions of the parties, makes the following findings and conclusions and issues the order set out at the end hereof:

II

Findings of Fact

Respondents' Business Activities and Sales in Commerce

1. Respondent Trans World Accounts, Inc.[1] is a California corporation with its office and principal place of business located at 2800 Cleveland Ave., Santa Rosa, California (Ans. TWA, ¶1). TWA

[1] Hereinafter referred to as TWA.

was incorporated in California on November 5, 1970 and is a licensed full service collection agency engaged in the sale of debt collection services (CX 2a, b, 40–41).

2. Individual respondent Floyd T. Watkins formulates, directs and controls the acts and practices of the corporate respondent (admitted Ans. TWA, ¶1) including the drafting and review of the forms challenged in the complaint (Watkins, Tr. 98, 105, 331, 333–35). He now owns the majority of the outstanding shares of stock of TWA (CX 40–41; Watkins, Tr. 55).[2] He has been an officer and [7] director of the corporation since its beginning (Watkins, Tr. 53–54; CX 40–41; Ans. TWA, ¶1, CX 2a). Mr. Watkins has been the vice-president or president and general manager of TWA since January 1971 and he is currently the president (Watkins, Tr. 53–54; CX 40–41; Ans. TWA ¶1, CX 2a).

3. TWA is currently operating and marketing debt collection services in California, Washington, Arizona, and Hawaii. Previously, TWA sold its services in South and North Dakota, Minnesota, Montana, Massachusetts, Alaska, Utah and Nevada (CX 2, 40–41; Watkins, Tr. 83).

In addition to the main office in Santa Rosa, TWA has had branch offices in Seattle, Los Angeles, Oakland, Dallas and Hawaii (Watkins, Tr. 83). As an example of the size of each branch office, Mr. Watkins testified that approximately 10 or 11 people work at the Los Angeles office (Watkins, Tr. 129–30). There are about 35 employees at the main office in Santa Rosa (Watkins, Tr. 82).

4. The corporate respondent offers a number of different debt collection services such as collection of accounts for a percentage of the remittance, personal contact of debtors, and the preparation of a series of form notices and letters to be mailed to delinquent debtors at regular intervals (Ans. TWA, ¶2, CX 2b). The series of form letters are purchased by creditors for a "flat rate" (CX 3b, 4; Watkins, Tr. 61). The charges in this case are related primarily to the acts and practices which occurred in the operation of TWA's flat rate debt collection service (Motion for Summary Decision, Tr. 44–45).

5. Respondents are one of the largest debt collection agencies in California and, as estimated by Mr. Watkins, have the largest flat rate service in the state (Watkins, Tr. 84–85). TWA attempts to collect about $40 million of delinquent debts per year and annually contacts about 130,000 individual debtors (Tr. 345–46).

[8] 6. In the course and conduct of their business, TWA and Floyd T. Watkins have been and now are in substantial competition in or

[2] There are six other stockholders with percentage interests ranging from 2 1/2 percent to 13 percent (Watkins, Tr. 55).

affecting commerce (as "commerce" is defined in the Federal Trade Commission Act) with other corporations, firms and individuals in the sale of debt collection services (Ans. TWA, ¶3, ¶10).

7. The corporation, TWA, is made up of three divisions, Trans World Accounts, Credit Management Services, and Trans World Computer Services. The Trans World Accounts division is a full service debt collection agency with both flat rate and percentage of remittance services. The primary responsibility, however, for this division of the corporate respondent is the preparation and mailing of the flat rate letter series (Watkins, Tr. 57–58; 67).

About a year after TWA was formed, respondents developed the Credit Management Services (CMS) division (Watkins, Tr. 65). CMS is also a full service collection agency, but it normally handles the percentage fee accounts after the letter series has been mailed to the debtor and failed to evoke response and the creditor has assigned the account to TWA for "hardcore" collection (Watkins, Tr. 67, 74–75).

The third division of TWA is a computer services division which provides computer services for the other divisions and to outside entities. The computer division prints TWA's debtor contact letters (Watkins, Tr. 81).

8. Respondents' services are sold to clients by independent commissioned sales representatives (Watkins, Tr. 83). The client using the flat rate service purchases four-part transmittal forms from the sales representatives. The form is filled out by the client with the debtor's name and address and other pertinent information and is sent to TWA. Upon receipt of the transmittal, the letter series is begun by respondents. The client, either because it has received payment or made payment arrangements with the debtor, may send the respondents the second part of [9] the transmittal form and stop the letter series. If the debtor should make a committment to pay on a certain schedule but fail to meet it, the client could send the third part of the transmittal form to TWA to resume the letter series. The fourth part of the form can be used to indicate payment and to generate a "Thank-you" letter to be sent to the debtor (CX 7i; Watkins, Tr. 89, 91–93; Stark, Tr. 176; Morris, Tr. 201).

9. TWA charges its clients between $3.92 and $8.00 to activate a letter series to a debtor (Watkins, Tr. 122). All of the flat rate letters originate from TWA's Santa Rosa office, but a local return address may be on the envelope if required by state law where the letter is sent (Watkins, Tr. 102).

A flat rate series of six letters is sent to the debtor over a period of from 85 to 90 days. A five letter series would be mailed over a 60 or

70 day period. The letters are sent to the debtors approximately 10 to 14 days apart (Watkins, Tr. 336).

The respondents guarantee to purchasers of the flat rate service that they will "contact the debtor over a period of 85 to 90 days so many times, depending upon the type of business that's involved" (Watkins, Tr. 62). Respondents also offer to their creditor-clients, a guarantee that the client will collect from their debtors at least two times their investment to purchase the flat rate service transmittals (CX 8b; Watkins, Tr. 122).

10. In general, an agency which sells only a flat rate letter service does not obtain an assignment of the debt from the creditor. The collection agency's only obligation with respect to the debt is to send the series of letters to the debtor (Brouilette, Tr. 267). A collection agency which pursues a debt beyond a letter series and is paid a percentage of the monies collected normally obtains an assignment of the debt from the creditor.

TWA, however, sells its flat rate debt collection services to creditors on both an assignment and a non-assignment basis (Watkins, Tr. 70–71). The percentage of flat rate services sold on an assignment [10] basis by TWA has increased steadily since its incorporation. Currently, TWA receives an assignment of the debt before the first letter in the series is mailed in about 80–90 percent of all flat rate sales. TWA's flat rate letter series service is the same whether or not the creditor-client has assigned the debt. Respondents obtain the assignment in the first instance so that if all letters in the series have been sent and there has been no response from the debtor, the account can be transferred to the CMS division for "hardcore" collection on a percentage fee basis. CMS employs methods other than letters such as telephone calls and conceivably law suits. Nevertheless, even in "hardcore" collection cases, CMS sends several "pre-treatment" letters over a period of 15 days (Watkins, Tr. 74–75). The principal difference between the letters sent as part of the flat rate service and the "pre-treatment" letters is that in the former the debtor is instructed to pay the creditor while the latter requests payment directly to respondents (Watkins, Tr. 75–76).

11. TWA has used different letters in different states and has changed its forms for the flat rate series at various times, albeit somewhat infrequently (Watkins, Tr. 103–104). Principally, TWA's letters are from one of three series, intensive (see, *e.g.*, CX 21b, 22b, 23c, 24c, 25c); diplomatic (see, *e.g.*, CX 21a, 22a, 23b, 24b, 25b); and bad check (see, *e.g.*, CX 21c, 22e, 23d, 24d, 25d). Only the first letter in each of the three series differs.

Telegram Format

12. The complaint alleges and respondents admit that they have mailed through United States mail, as one form of their letter series to delinquent debtors, "A yellow window envelope on which a return address is printed, with no name. . .The work TELEGRAM is printed in large balck type over the window and on the reverse side," and "A yellow printed form, styled TELEGRAM designed to be inserted in the envelope. . . ." The forms used by the respondents are reproduced as follows (CX 36a-b)[3]:

[3] The name of the alleged debtor has been deleted in the reproduction herein.

TELEGRAM

No Words	Pd or Coll	Charge to the Account of	☒ Over Night Telegram Unless box above is checked this Message will be sent as a Telegram
66	PAID	TRANS WORLD ACCOUNTS, INC.	

BALDWIN PARK COMMUNITY HOSP DEBTOR NO.01405904 C
05940 14148 FRANCISQUITC REF.
001 BALDWIN PARK CA 91706
AMT DUE $72.10

12/31/74

17444 HOLLY DR
FONTANA CA 92335

ABOVE CLAIM IS STILL UNSATISFIED. INVESTIGATION MAY DISCLOSE UNPAID CHATTELS, LIENS OR OTHER OUTSTANDING CLAIMS AGAINST YOU. SETTLE ABOVE ACCOUNT WITHIN 48 HOURS BY MAKING FULL PAYMENT DIRECT TO OUR CLIENT WHO WILL ADVISE US TO CEASE FURTHER ACTIVITY. DO NOT CONTACT CLAIMS OFFICE OF TRANS WORLD ACCOUNTS, INC., 2800 CLEVELAND AVENUE, SUITE 1, SANTA ROSA, CALIF., OR ANY OF OUR HUNDREDS OF ASSOCIATE OFFICES NATIONWIDE.

FEDERAL TRADE COMMISSION

CX-36a

Trans World Accounts, Inc., et al.
Docket No. 9059

Message Enclosed in Foregoing CX-36b

P. O. BOX 1864
SANTA ROSA, CALIF. 95403

TELEGRAM

CX-36b

Trans World Accounts, Inc., et al.
Docket No. 9059

Front Side of CX-36b

Telegram

Reverse Side of CX-36b

[13] As the complaint charges, the respondents have represented directly or by implication that the envelopes and forms pictured above are telegraphic communications when in fact they are form letters printed by a computer and sent by United States mail (Watkins, Tr. 109; CX 40–41, Adm. No. 30).

13. The Communications Act of 1934, Section 214, gives the Federal Communications Commission authority to approve all entry into public message telegraphic service. Telegrams are messages forwarded by telegraphic service.[4] Electricity is used to transmit a telegraphic message or telegram.

The Western Union Telegraph Company is the only "carrier" duly licensed by the Federal Communications Commission to conduct a public message telegraphic service. For over thirty years, Western Union has been the sole licensee for this service in the United States. The people in this country associate the term "telegram" with messages sent by telegraphic transmission and also with Western Union.

14. Western Union telegrams are printed on different forms but the different forms are quite similar. One such format used by Western Union is in the record. See attachment to affidavit, CX 43, of M. Borsella, patent attorney for Western Union. For respondents' stipulation of the admissibility of this affidavit, see CX 42a, No. 4.

15. The similarities between the respondents' simulated telegram and the Western Union telegram are obvious.

(a) Both forms are yellow (see CX 4 in complaint counsel's Motion for Summary Judgment).

(b) The forms are relatively the same size, *i.e.*, smaller than an 8 1/2" x 11" standard business letter.

(c) Both forms have a dark band across the top which bears the word "telegram." [14]

(d) Both forms have the following notations which would be extraneous to respondents' forms were they not simulating a Western Union message:

(1) the box on the extreme right with the notations "Over Night Telegram" and "Unless box above is checked, this Message will be sent as a Telegram."

(2) the box in the center which says, "Charge to the Account of."

(3) on the left, the notation for "No. words."

(4) Both forms have a box to indicate whether the message is "Pd. or Coll."

(e) Both forms are delivered in a yellow envelope of nearly

[4] Webster's Seventh New Collegiate Dictionary defines telegram as a "telegraphic dispatch."

identical size, both of which have a transparent window for the address.

16. Respondents' "telegram," sent through ordinary United States mail, is sufficiently similar to a genuine telegram to have the tendency and capacity to deceive members of the general public, and lead debtors to believe that respondents' message has been transmitted telegraphically by Western Union.

17. Clearly respondents' use of the yellow "telegram" (CX 35) misrepresented that the message was a telegram, and thus, misrepresented the nature of communication. Respondents argue that they developed the telegram format, believing that the word "telegram" was in the public domain because of an alleged notice to that effect from the attorney general's office for the State of California (RX 4, but see also CX 39). Even if the word "telegram" is in the public domain, and it is not for this hearing to decide whether it is or is not, respondents went further than just using the word "telegram." They attempted both with color and format to make their debtor contact look very much like a Western Union telegraphic communication. [15] This form did then misrepresent the nature of the communication. It appeared to be a Western Union telegram and it was not. At the least, respondents' "telegram," as stated, had the tendency and capacity to deceive recipients into the mistaken belief that they were receiving a telegraphic communication, and thus had also the tendency and capacity to mislead delinquent debtors or allegedly delinquent debtors as to the nature of the communication received.

18. Western Union charges, or at one time charged, the sender of a telegram $7.95 for a basic delivered 15-word message. Thereafter, the cost increased at the rate of 8 cents per word. A Western Union Mailgram[5] now costs the sender about $2.75 for a single message. Presently a first class message sent by United States mail costs $.13 per ounce. A reasonable person who sends a message using the Western Union telegram or mailgram must have a particular reason for spending considerably more to use the telegraphic system than the mail. The sender either wants the message to reach the recipient quickly or wants the recipient to regard the message as so important to the sender that extra money was spent to send it, or both. Examples of possible uses for telegraphic messages include notices of personal tragedy, confirmation of contracts, and myriads of others.

19. In everyday life, because of the expense of sending telegraph-

[5] Western Union presently offers the public an alternative to the telegram, called the Mailgram, which is partially sent by telegraphic communication and partially by mail. The message is telegraphed from the sender to the recipient's general location and is then delivered by regular mail. A Mailgram is printed on blue and white paper (RX 1).

ic messages, most people receive more items of communication through the mail than through the use of Western Union's telegraphic system. By its sheer uniqueness the telegram has a greater impact[6] on the recipient than a letter. One client of respondent was aware of this extra impact and testified: [16]

> Q: Well, why is it that [TWA] is effective in getting results where you yourself have made a phone call and sent a letter and you didn't get results?
>
> A: Well, there I have to — having not been at that end — not being in the customer's organization, I can only suppose what it is. I really think that the telegrams — now Trans-O-Grams — are handed to higher echelon that effect payment. . . . (Anderson, Tr. 254).

20. The complaint in this case charges respondents with misrepresenting the import and urgency as well as nature and purpose of the communication. The dictionary is our best guide for determining what is meant by misrepresenting "import" and "urgency." Import is equated by Webster's with significance. Urgency is defined as something requiring prompt attention. By its greater impact on the recipient, a telegram tells the recipient that it is more significant and requires prompter attention than a letter.

21. Complaint counsel's recipients all stated that they felt the first communication from the respondents was - upon first impression - more significant and urgent than they regarded it after reading the message, as follows:

> When I first received this — looking at the front of the envelope. . . .The Trans-O-Gram—[7] the first thing that struck my mind, "I wonder if this is something similar to a Mailgram, urgent letter, you know." So I opened it, you know, thinking something has happened to my family or something. Then I see that it's from a collection agency. I was rather distrubed (Doolittle, Tr. 46). [17]
>
> My first contact with Trans World Accounts, Inc., began in mid-1973, when my mother received by mail a billing notice in the form of a telegram. She became very upset when she saw the telegram and thought something had happened to someone in the family. She opened the envelope and read the contents and discovered it was a billing notice and was further upset that it was sent as a fake telegram. When my mother showed me the billing notice, I thought it was a real telegram until I read it and realized it was a fake (Semien, CX 42a, 44a).
>
> When I first received the collection notices, I thought they were real telegrams sent by Western Union. I did not realize they were fakes and not real telegrams sent by wireless. . . when I got the fake telegram I got upset becsause I thought something was wrong (Pere, CX 42a, 45a,b).

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[6] In its advertisements the Western Union Company emphasizes the "impact" of messages sent by their telegraphic system (RX 3a, Tr. 146-149).

[7] Respondents have discontinued the use of the yellow form notice to debtors which is styled TELEGRAM (Watkins, Tr. 107). They now use a form called the Trans-O-Gram which is blue and white and is mailed to debtors in the same manner as the "telegram." The Trans-O-Gram and its envelope are in the record and are discussed later herein (CX 51a-b).

22. There is no doubt that respondents' creditor-clients feel respondents' messages are "significant" and "require prompt attention." Mr. Anderson of Bechman Instruments expressed it most persuasively:

> We have an agreement with our customer that we would supply our product, and in our opinion we've done everything that we had committed ourselves to, and now the customer has a commitment to us, an obligation to pay us, and to pay us according to the terms that we agreed. When he is not living up to that, certainly it's urgent. The longer it goes beyond our terms the more urgent it becomes. We're a profit making organization, and we must have our money. We must have a continuous cash flow in order to survive (Anderson, Tr. 260).

However, creditors apparently do not consider these messages as important or urgent as they want recipients to believe them to be or they would actually use the [18] telegraphic system and pay the higher cost. If the format of the message causes, or has the capacity to cause, recipients to believe the message has been sent faster or more expensively and is more important than regular mail, the format misrepresents the import and urgency of the message. The undersigned finds that the "telegram" format used by respondents had the capacity to accomplish, and accomplished, this result.

23. The *purpose* of the format of any debt collection message is to try to make the debtor take special note of the message, to read the message, pay attention to it and pay the debt, as opposed to filing it away with other mail or throwing it away. If a creditor were to send a real telegram or mailgram to the debtor, the creditor's purpose would be to make the debtor take special note of the message, to read it, and act on it as opposed to filing it or throwing it away. The purpose of both a real telegram and a telegram format in a debt collection context is to impress upon the debtor the import and urgency of the contact. Therefore, it is hard to understand how the use of the telegram format misrepresents the *purpose* of the communication. Webster's defines purpose as the particular thing to be effected or attained. The creditor wants to attain the attention of the debtor. This can be accomplished by sending a telegram or a simulated telegram, the purpose being the same in either case. Respondents' use of a telegram format thus, in the opinion of the undersigned, did not misrepresent the purpose of the communication.

Imminence and Probability of Legal Action against Debtors

24. The complaint charges that statements in the messages sent by respondents during the course of their flat rate letter service misrepresented that legal action "is about to be, or may be initiated" against the debtor during the course of the flat rate letter series. The collection notices sent by respondents do represent, by implication, that the third party (TWA) or the creditor brings a lawsuit during its flat rate letter series when, in fact, it does not. The language in the letters sent to debtors during the flat rate letter service has been carefully composed so that no threat of legal action is literally [19] expressed. Nevertheless, what the letters say and what the letters imply are different things. Consider the following sent by respondents to debtors. One letter (CX 25c) says:

> Urgent — Immediately contact our client and make arrangements for payment. Imperative to avoid further action which may be taken against you under provisions of state statutes. If settlement is not made within 5 days after receipt of this telegram, you may wish to consult your attorney regarding your legal liability.

The second sentence of this communication uses the word "may" to express possibilities but implies, in the context of the communication, high probability. The last sentence tells the debtor that he or she may wish to consult with an attorney regarding legal liability "[i]f settlement is not made within 5 days." The phrase strongly implies that the recipient will need a lawyer if payment is not made in 5 days. A "net impression" of imminent legal action is thus conveyed. Further, the communication is termed a telegram with a concomitant suggestion of urgency.

25. Another letter, number four in a series (CX 25g), reads, as follows:

> Amount of this unpaid claim may justify client taking legal action in small claims court or through his attorney in higher courts. If such action is undertaken and results in judgment against you, writ of execution may be issued against your attachable assets. Cost of such proceedings may be assessed against you thereby increasing your indebtedness. Strongly advise you to make payment direct to our client today.

By warning the debtor that the unpaid claim "may justify" "legal action in small claims court," and making reference to "judgment," "writ of execution" and "[c]ost [20] of such proceedings," suggesting court costs, the implication is strongly conveyed that, without payment, legal action is likely and imminent. The final sentence "[s]trongly" advising payment "today" reinforces the impression of imminence.

26. Respondents recently added an "attorney letter" to their series which is a form letter typed by computer and signed by an attorney retained by respondents (Watkins, Tr. 338). One example (CX 50) of respondents' "attorney letter" is recited below:

> My client, Trans World Accounts, Inc., has requested this office review the above claim and contact you. If you owe the debt, I seriously suggest you pay it now or contact your creditor immediately to resolve this matter. Full payment or satisfactory arrangements must be made forthwith or I must recommend to my client that your creditor go forward and seek its full legal remedy under the law. Should this claim warrant legal action, additional expense such as court costs and service of process may well increase your debt and thus your financial obligation. I must advise you to give this matter immediate attention as my office has no authority to withhold further processing or proceedings.

This "attorney letter," signed by respondents' California attorney, is sent to debtors in all the states, although the signing attorney sends delinquent accounts, which have been assigned to TWA for "hard core" collection, to an attorney in the debtor's locale for review and the local attorney files suit if deemed advisable (Watkins, Tr. 340–341). The net impression conveyed is strongly that if payment is not forthcoming, the signing attorney will initiate suit, particularly in view of the last sentence which implies that the creditor has ordered legal processes to start and the attorney has no authority to withhold them. [21]

27. Still another letter (CX 22d), conveys the imminent probability of a lawsuit, as follows:

> You have not satisfied our client concerning the above debt as we requested a few days ago. We strongly urge you to make payment direct to our client while you still have the opportunity. Our client may refer this matter to legal counsel which could be turned into an immediate court suit. Such a procedure could be very costly to you. Avoid unpleasant complications and make payment direct to our client, not to claims office of Trans World Accounts, Inc.

28. Another sequence of letters used by respondents in the State of Washington (CX 21a–g) employs essentially similar language to that in the letters quoted above. An early letter advises:

> You are hereby directed to appear at our client's office at 9:00 A.M. next Tuesday to protest liability of the above claim. Failure to comply may result in immediate commencement of litigation by our client. If judgment is granted, property, including monies, automobile, credits and bank deposits now in your possession could be attached. If our client receives payment in full prior to the time of protest as scheduled, your appearance will not be required (CX 21b).

This letter suggests that the creditor has some legal power to require the debtor to appear at his office when, of course, the creditor cannot, without a court's intervention, require the debtor to appear

anywhere. The letter conveys the impression that if the debtor does not appear, the creditor will sue. The letter implies that unless the debtor pays or [22] appears as directed, he may forthwith lose his property. Again the legal phrases such as "liquidating this claim," and "litigation" are used to give the message a legal authoritative, and compelling aura. The net impression of legal action and the imminence thereof is very strong.

29. Another letter in the series states:

> You have had ample time to pay this claim. I have advised you of some of the legal remedies our client may use to obtain satisfication, and I strongly advise you not to take that risk. If settlement is not made within 5 days after receipt of this letter you should consult with your attorney regarding your legal liability. Make voiuntary payment now and protect your credit standing (CX 21e).

This language not only implies legal action, but that it is imminent by stating that the debtor should consult his attorney if settlement is not made within 5 days.

30. The next letter, (CX 21f), reads:

> You have received the benefit of earlier notices from this office and have failed to discharge your obligation. We hereby request verification as to employer's name and address, banks with which you do business, mortgage holder on home, and legal owner of automobile. This information is necessary when filing suit and is to be forwarded immediately to our claims office for their records. If payment has been made, it is imperative that our client notify our office immediately so we can discontinue the processing of this claim.

[23] Again, the net impression that legal proceedings are about to be initiated unless payment is received is strongly conveyed, for example, the employer's name and address, name of banks, etc., are "necessary when filing suit," and are to be forwarded by the debtor "immediately." It is suggested to the debtor that his home, automobile and savings are in jeopardy. The final sentence reinforces the foregoing. Respondents warn the debtor that it is "imperative" that they be notified by the creditor if payment has been made. Why? The sentence suggests that respondents are "on the way to the courthouse with filing papers in hand" and if the debtor pays, he must tell his creditor to contact TWA *immediately* to stop the suit.

31. The series used by respondents in Massachusetts, (CX 22), has a letter, #4 in the series, which states the following:

> Urgent — Appear at Claimant's office within four days to pay above claim or protest your liability. Failure to appear in person or have legal counsel represent you may result in immediate litigation by our client with ultimate seizure of property, auto, bank accounts and other personal assets if judgment is obtained.

This letter suggests, like others already discussed, that respondents

and their clients can conduct a court-like proceeding and require the debtor's appearance. More importantly, it conveys the impression that failure to appear in person or by counsel may result in "immediate litigation" with ultimate seizure of the debtor's auto and other assets if judgment is obtained. In the language of the complaint, the letter represents that "legal action" is "about to be, or may be, initiated."

32. Respondents argue that because they have an assignment of the debt in approximately 90 percent of the accounts they receive for collection (Watkins, Tr. 70–71), [24] and because they are a full service debt collection agency (Watkins, Tr. 134–135), the possibility of legal action depicted in their letters is, in fact, a distinct reality. In actuality, however, whether or not the debt was initially assigned made no difference in the consequences of a debtor's failure to respond to any of the letters in the series.

33. In both TWA's assignment and non-assignment flat rate debt collection service, the collection notices are sent in a set sequence (*see* handwriting on CX 21 through CX 28 which notes are in evidence, Tr. 106). The consequence of the debtor's failure to pay after receipt of one letter was receipt of the next letter. One of the letter series (CX 25b) was read to Mr. Watkins during the hearing and he was questioned about the reference to the statement that in 10 days other collection procedures could begin.

> Q: . . . what would these procedures consist of?
>
> A: We'd generate another contact, a No. 2 contact to the debtor (Watkins, Tr. 333).

34. Legal action with respect to an alleged delinquent debt was neither about to be, and, except in the rarest of circumstances, would not be initiated by either creditors or respondents during the course of the series of form notices and letters.

35. Creditors who purchased the flat rate service and testified at the hearing, indicated that they did nothing in regard to the account for the duration of the letter writing series:

> Q: Do you do anything to effect payment of the overdue or delinquent debts during Trans World Account's service?
>
> A: No. That's the nice part of it, from our point of view.
>
> I'm responsible for many other things, dollarwise more important and timewise, that there are some [25] periods during the year where I literally would just be derelict in my duty if I had to get something out like that.

The fact that they sent out automatically on a timely basis these followups, is very good . . . .

Q: So other than sending out the invoices or bills, if that didn't work, then you just turned it over to Trans World Accounts and basically forgot about it?

A: Uh-huh (Stark, Tr. 177).

* * * * * * *

Q: When you turn the account over to TWA for the flat rate service, their letter service — once you have turned it over to TWA, do you make other reference [sic] to collect the debt?

A: No, we do not (Schmale, Tr. 215).

Q: When you have to, you've gone through your collection procedure and turned it over to Trans World Accounts.

Do you do anything to effectuate payments?

A: Only if the member contacts us.

Q: If they don't contact you, you leave it up to Trans World Accounts?

A: (Witness nods Head) (Morris,Tr. 205).

36. As in the assignment situations, one creditor client of TWA who did not assign his accounts for the flat rate letter series testified that he would not [26] begin legal proceedings against a debtor during the course of the letter series:

Q: Do you ever bring a lawsuit while the series of letters is being sent out?

A: No. We would first stop the — terminate or suspend TWA.

Q: But if they — suppose a debtor has not responded at all after the first, second or third, would you let the series go to its conclusion?

A: Yes. That's our policy.

Q: Then you would decide whether to bring a lawsuit; is that correct?

A: Yes, unless we heard through other sources, either from a salesman that goes by and sees them moving out of the building, or some evidence that would indicate that, "Hey, they're closing up." Then we'd stop the service and file suit (Anderson, Tr. 257).

37. TWA, moreover, makes clear in its advertisements that it does not sue when the creditor only purchases the flat rate service:

DOES TRANS WORLD ACCOUNTS SUE DEBTORS? NO! . . . OUR LOW PRICE MAKES THIS UNFEASIBLE. IF YOU WISH TO SUE, CONTACT

YOUR SERVICE REPRESENTATIVE WHO WILL EXPLAIN OUR COST FOR THIS SERVICE TO YOU (CX 8b).

Thus, TWA, in selling its flat rate debt collection letter service does not enter into any agreement with the creditor at the outset of the letter service to do anything other than mail a certain number of form letters to debtors.

[27] 38. After the last notice or letter in the flat rate series has been sent to the debtor, TWA contacts the creditor, whether or not there has been an assignment of the debt, to determine future courses, including legal action (Watkins, Tr. 73–74). Even in assignment situations, the creditor-clients have a right to cancel the assignment after the letter series is completed:

> Our arrangement with them [TWA] is that all of the accounts are assigned. We do have an option of cancellation within a certain specified time without paying a fee, other than the flat fee that we have paid at the outset (Schmale, Tr. 210; see also Morris, Tr. 205–206).

39. After all letters in the flat rate series have been sent and when the accounts have been assigned and respondents have received approval from their clients to go ahead with "hardcore" collection, a lengthy period of time typically elapses before suit is brought, if suit is ever brought.

Mr. Watkins explained during the course of the hearings the kind of procedures which are used by most agencies in percentage commission situations:

> . . .agencies use what we call the PTL in the industry, a pre-treatment series. That can be anywhere from two, three, four, five contacts by letter that they send out to a debtor.
>
> The advantage of this is the fact that they don't pay a commission to a collector if the account is collected.
>
> Now, if the account is not collected on the PTL program, then the account would be given to a collector or assigned to a collector's desk by alphabet. Most collection agencies are divided A through L and et cetera. [28]
>
> The collector at that time would make two or three contacts, telephone contacts, and then determine that the account is not collectable through the use of the normal collection procedure. He would make up what we call a court action or a debtor assignment — I mean, a record of assets. He would request permission from his manager to sue the account.
>
> The manager, then, would take a look at the assets and make a judgment, send it to the attorney's office with instructions for suit. If the attorney agreed, the account would be sued.

> After the judgment is granted, then you would execute on the assets, if the debtor didn't pay voluntarily (Tr. 126).

Respondents follow all these procedures typically utilized in the debt collection industry (Watkins, Tr. 127).

40. Even after the pre-treatment letters have been sent by respondents' CMS division, the debtor is not immediately sued. The account is given to a collector to make telephone calls to the debtor. And even if the debtor adamantly refuses to pay, respondents make some evaluation before they bring a lawsuit. Each individual account is reviewed by respondents to determine whether the debtor has any assets, the amount of the debt, and whether the contract with the creditor calls for recovery of costs by respondents. After the review, respondents decide whether they will initiate a lawsuit (Watkins, Tr. 76–78).

41. There are no set policies used by respondents as to which debtors will be sued, and each case is individually evaluated before respondents bring suit. Mr. Watkins noted respondents' guidelines: [29]

> One would be the strength of the case. In other words, if we look at the account and there's no dispute, there's no problem. Two, if it calls for attorneys' fees, court costs, contract where we have an opportunity to recover our costs.
>
> Three, there are other things that are also involved. The fact of whether the debtor is currently employed. In other words, what we call job assets, an asset investigation, whether there's property involved, attachable assets. Things like this (Watkins, Tr. 307).

42. Although in many communications with one debtor whose affidavit is in the record of this proceeding, respondents indicated the imminent possibility of suit, almost a year of collection activity was expended and no suit was brought (Watkins, Tr. 305). The same is true of the other debtor who signed an affidavit. This debtor was sent the letter series, her account was transferred to CMS division and she was sent a notice of assignment. She set up a payment program with respondents but failed to meet this commitment (Watkins, Tr. 298–299). She was then sent additional "pre-treatment," dunning letters. Again, although each letter indicated that a lawsuit was imminent, this was not the case (Watkins, Tr. 299–301).

III

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondents. Respondents are now sending and receiving and have previously, in the course of their business, sent and received through the United States mail, letters, notices, forms, and other materials for use in the collection of delinquent debts. Respondents have done business in various states such as South and North Dakota, Minnesota, Montana, Massachusetts, Alaska, Utah and [30] Nevada. Respondents currently do business in the States of California, Arizona, Washington, Texas and Hawaii. Respondents have maintained a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

2. Mr. Watkins is individually responsible for the acts and practices of the corporate respondent. As an officer, director, and majority stockholder, he formulates, directs and controls the acts and practices of the corporate respondent, including those challenged in the complaint herein. Mr. Watkins has been the principal manager of TWA since its inception and was associated with the debt collection industry before the establishment of TWA. The order issued herein must be issued against Mr. Watkins individually as well as against the corporate respondent TWA to ensure that the acts and practices violative of Section 5 alleged in the complaint are finally stopped.

3. By the use of the envelopes and forms described in Paragraph Four of the complaint, and shown by the record of this proceeding, respondents have represented, directly and by implication, that the envelopes and forms are telegraphic communications when, in truth and in fact, they are not. The use by respondents of such envelopes and forms has, and has had, the tendency and capacity to mislead and deceive members of the public receiving them into the erroneous and mistaken belief that such envelopes and forms are telegraphic communications, and to mislead and deceive members of the public receiving them as to their nature, import and urgency.

4. Respondents have made statements and representations, as alleged in Paragraphs Seven and Eight of the complaint, in their notices and letters to debtors as part of their flat rate service which were and are false, misleading and deceptive in that they represent, directly and by implication, that legal action with regard to the debt may be, or is about to be, instituted during the course of respondents' series of form notices and letters when, in truth and in fact, as

alleged in Paragraph Nine of the complaint, such was not the case. While respondents' [31] letter writing service was being used, no legal proceedings were being or would be initiated on the basis of the alleged debtor's failure to respond to respondents' communications. Such false, misleading and deceptive statements and representations have, and have had, the tendency and capacity to cause members of the public to pay substantial sums of money as alleged in Paragraph Eleven of the complaint.

5. The acts and practices of respondents, as alleged in the complaint and found herein, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

IV

Discussion

There can be no doubt that debt collection is a legitimate function in our economic system. Consumers everywhere must subsidize, through higher product prices, those persons who buy products or use services which they do not pay for. Unquestionably there are those who take advantage of the relative ease with which credit can be obtained in this country, buying with little or no intention of paying. There are others, however, who do not pay because they have disputes with their creditors. And there are still others who do not pay simply because they cannot pay, either due to changed circumstances in their lives or, perhaps, to over extension of their payment capabilities. Whatever the reason for non-payment, payment from debtors may not be exacted by misrepresentation, deception, and other unfair practices in debt collection activities. *Floersheim* v. *F.T.C.*, 411 F.2d 874, 878 (1969), *cert. denied*, 396 U.S. 1002. [32] Respondents argue that all three of complaint counsel's witnesses have ultimately escaped payment of legitimately owed obligations (Respondents' Proposed Findings, p. 5). The Commission, however, has repeatedly expressed its view, as already indicated, that "The legitimate objective of seeking to induce debtors to pay their debts does not justify the use of illegitimate and unlawful means. There is no lack of public interest in the protection of such persons merely by reason of their delinquency." *Allied Information Service*, 56 F.T.C. 1615, 1618 (1960).

Telegram Format

The telegram format as used by respondents had the tendency and capacity to mislead recipients as to the nature, import and urgency of the message. Capacity for deception is sufficient for a violation and the invocation of a cease and desist order under Section 5 of the Federal Trade Comission Act. It has been well settled since *Charles of the Ritz* v. *FTC*, 143 F.2d 676, 680 (2nd Cir. 1944), that actual deception need not be shown. Respondents contend that complaint counsel should have produced at least one witness who was led by the telegram format to pay or to take some other action which would not have been taken if such person had not been misled by the misrepresentation as to the simulated telegram's nature, import and urgency. All three of complaint counsel's witnesses indicated that they felt the message they had received was something other than a regular letter. Though each of these persons ultimately discerned that the messages were simply debt collection letters in the format of a "fake" telegram, their initial impression was that they had received a telegram. As noted in *Carter Products, Inc.* v. *FTC*, 186 F.2d 821, 824 (7th Cir. 1951):

> The law is violated if the first contact or interview is secured by deception, *Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112, 115, 58 S. Ct. 113, 82 L.Ed. 141, even though the true facts are made known to the buyer before he enters into [33] the contract of purchase. *Progress Tailoring Co.* v. *Federal Trade Commission*, 7th Cir., 153 F.2d 103, 104, 105. See also, *Aronberg* v. *Federal Trade Commission*, 7th Cir., 132 F.2d 165, 169.

Moreover, one of complaint counsel's affiants apparently did contact Trans World Accounts after she had received the "telegram" and arranged an installment payment plan (Watkins, Tr. 297, 298, 299). Whether this was a reaction to the telegram format or to the statements in the communication in it, or both, is not established. In any event, the Commission can look at the fact that a "fake" telegram was utilized and conclude that such practice has the tendency and capacity to deceive.

Respondents, however, oppose inferences drawn from the "four corners" of the "fake" telegram itself relying on the Commission's recent decision in the Alaskan artifacts case, *Leonard F. Porter, Inc.*, CCH Trade Reg. Rep. ¶21,225, Order of October 19, 1976 [88 F.T.C. 546]. The Commission, after looking at the various artifacts in the record, decided that it could not assume that consumers mistook the souvenirs to be genuine Alaskan art objects without some evidence to that effect. But the Commission determined that this ruling was warranted by the unique circumstances of the Indian artifacts case.

No such record evidence is necessary when, as with a "fake" telegram, the item or message alleged to be deceptive conveys "the same meaning to the Commission viewing it in chambers as it does to consumers seeing it in their living rooms." The Supreme Court in *FTC* v. *Colgate Palmolive,* 380 U.S. 374, 391–92 (1964), concluded that it was not "necessary for the Commission to conduct a survey of the veiwing public before it could determine that the commercials had a tendency to mislead for when the Commission finds deception it is also authorized, within the bounds of reason, to infer that the deception will constitute a material factor in a purchaser's decision to buy" or, by a parity of reasoning, a debtor's decision to pay a claim or to take other action. The Commission has the discretion to interpret meanings of communications and the "impressions they would likely make upon the viewing public." *Libbey-Owens-Ford Glass Company* v. *F.T.C.,* 352 F.2d 415, 417 (6th Cir. 1965).

[34] Respondents essentially do not insist on any right to continue to use "fake" telegrams, and in fact have stopped such use. Nevertheless, respondents offered numerous exhibits (RX 6–19) to support their contention that their simulated telegram was no more deceptive than somewhat similar devices, such as "Speed-O-Gram," "Autogram," "Gram," "Messagegram," etc., currently used in many different situations, *i.e.,* to notify customers of product sales, to elicit votes in political campaigns and to deliver messages of various kinds. In many if not most of these situations, however, the format does not have the capacity to misrepresent. In the opinion of the undersigned, the use of a "fake" telegram reinforced with a message implying dire consequences resulting from non-payment of a debt does, as earlier found, have the capacity to misrepresent to the debtor the nature, import and urgency of a communication which is merely a form letter in a series of form letters. The net impression which the format and communication makes upon the debtor is what counts. *Murray Space Shoe Corporation,* v. *FTC,* 304 F.2d 270, 272 (2nd Cir. 1962); *Kalwajtys* v. *F.T.C.,* 237 F.2d 654, 656 (7th Cir. 1956), *cert. denied,* 352 U.S. 1025 (1957). The Commission has previously considered, in the case of documents designed to simulate legal process, the impression likely to be generated by the overall appearance of documents. *S. Dean Slough* v. *FTC,* 396 F.2d 870 (5th Cir. 1968), *cert. denied,* 393 U.S. 980.

Several other arguments made by respondents should be noted. First, there is no reason to question respondents' good faith. Trans World Accounts, Inc. is a major debt collection operation in California and various other states, and there is no reason to assume

that respondents did not try to comply with regulations governing collection practices in all the states in which they did business.[8] "Proof of petitioner's intention to [35] deceive is not a prerequisite to a finding of a violation . . . ." *Regina Corporation* v. *F.T.C.*, 322 F.2d 765 (3rd Cir. 1963); *Gimbel Bros., Inc.* v. *FTC*, 116 F.2d 578 (2nd Cir. 1941).

Secondly, respondents urge that they have discontinued the use of the "telegram" form. It has been long established that even if a practice has been abandoned and assurances have been made that it will not be revived, the Commission has discretion to determine if the public interest requires protection against possible related and similar practices in the future, and the Commission can issue an order to prevent such. *Libbey-Owens-Ford Glass Company* v. *FTC*, *supra*, at 418.

Respondents have replaced their "telegram" with a format called the "Trans-O-Gram." The Trans-O-Gram is blue and white and approximately the same size as their "telegram" (CX 51a and b). The Trans-O-Gram does not explicitly refer to itself as a telegram, except in the body of the message of the first Trans-O-Gram letter in the series which states that if settlement is not made within 5 days after "receipt of this telegram," the debtor may wish to consult his attorney (CX 47a).

Respondents have been concerned throughout this proceeding about their ability to continue to use the Trans-O-Gram if an order is entered in this proceeding. The use of the Trans-O-Gram was not challenged in the complaint and thus a determination of its legality is not required. In the opinion of the law judge, nevertheless, the Trans-O-Gram envelope with the communication contained in it (CX 51a and b), has the tendency and capacity to mislead recipients. Although the Trans-O-Gram is less blatant, the name [36] Trans-O-Gram and the format of the communication is susceptible to being confused by poorly educated, credulous or unthinking recipients with telegraphic communications (see Doolittle, Tr. 46; and Stark, Tr. 172–173). The essence of what has been said with respect to respondents' "fake" telegram, in our judgment, applies to their subsequent Trans-O-Gram format.

Similarly, any other label and format used for respondents' communication with debtors which has the tendency and capacity to

[8] In fact, there is evidence that respondents did attempt compliance with the regulations of the various states in which they did business. Respondents did not use the telegram in Washington and Texas where it was prohibited (Watkins, Tr. 98, 120–121). Respondents discussed all of the letter forms used in their business with the Bureau of Collection and Investigative Services of the State of California, and although it was not the practice of the Bureau to specifically approve debt collection forms, the Bureau did not disapprove of any forms used by respondents (Bishop, Tr. 221–222; Watkins, Tr. 98).

mislead by confusion with more expensive, different or urgent types of communication, such as telegraphic or personal delivery, would violate Section 5 and the order issued herein. If the debtor has simply received a letter from respondents, he should know it is simply a letter without possibility of confusion or deception.

Imminency of Legal Action

The messages contained in the form letters sent to debtors as part of respondents' flat rate service misrepresented that legal action was about to be initiated against the debtor when, in fact, many steps and much time would intervene, in both assignment and non-assignment situations, before legal action, even if determined upon, truly was imminent.

Respondents argue that because they are a full-service debt collection agency and because they obtain an assignment of the debts from about 90 percent of their clients, that they are fully able to begin legal action at any time against their clients' debtors. Accordingly, respondents contend that the statements made in their form letters about the possibilities of legal action are literally true. But this does not render respondents' statements nondeceptive because what was misrepresented was the *imminence* of legal action. Actually in only the rarest of cases, if ever, would respondents bring suit during the course of their flat rate service.

[37] The contention that the ability to bring suit rendered respondents' communications truthful is rejected. Although there may have been a theoritical ability to institute legal action during the form letter series, as stated, this was never done or was done so rarely as to warrant being disregarded. Even if respondents' statements, or some of them, are considered to be literally true, the overall net impression conveyed was that legal action, and concomitant dire consequences, was *imminent* if the debt were not paid forthwith, or an accommodation entered into forthwith with respect to the debt. This net impression was false and deceptive. In *Murray Space Shoe Corporation, supra,* the Commission found that a shoe manufacturer's statements about the pain relieving qualities of its shoes were literally true but that the additional implications of its advertisements were misleading. The Second Circuit, *supra,* at 272, upheld the Commission and said:

> In deciding whether petitioners' advertising was false and misleading we are not to look to technical interpretation of each phrase, but must look to the overall impression these circulars are likely to make on the buying public . . . And statements susceptible of both a misleading and a truthful interpretation will be construed against the advertiser.

See also, *Katwajtys, supra,* at 656: "a statement may be deceptive even if the constituent words may be literally or technically construed so as not to constitute a misrepresentation;" *United States* v. *95 Barrels of Vinegar,* 265 U.S. 438, at 443 (1924) which states, "[d]eception may result from the use of statements not technically false or which may be literally true;" and *Rhodes Pharmacal Co.,* v. *F.T.C.,* 208 F.2d 382, 387 (7th Cir. 1953), modified on other grounds, 348 U.S. 940 (1955), noting that, "[a]dvertisements which are capable of two meanings, one of which is false, are misleading . . . . [a]dvertisements which create a false impression although literally true, may be prohibited." That deception by innuendo rather than outright false statements may be so accomplished is firmly established. *Bakers Franchise Corporation* v. *F.T.C.,* 302 F.2d 258, 261 (3rd Cir. 1962).

[38] Respondents cite (Final Brief, p. 18) *F.T.C.* v. *Sterling Drug Company, Inc.,* 317 F.2d 669 (2nd Cir. 1963), as support for their view that the courts will curtail the Commission's discretion to determine when literal truths emit misleading impressions. In rejecting a Commission argument the court refused, at 676, to attribute to the ordinary reader "a careless and imperceptive mind" or "a propensity for unbounded flights of fancy." However, in this case, "no unbounded flights of fancy" would be necessary for a debtor to infer from the letters sent by respondents that suit is imminent, particularly in view of the fact that some of the sentences in respondents' letters have no meaning beyond that suggestion.

It may be true, as respondents note in their proposed findings, p. 17, that "[a] mass mailing of even the mildest type of debtor communication is bound to ferret out a certain percentage of individuals who will be misled, frightened or intimidated." Respondents' mailings to debtors were not of the mildest kind. Their letters included references to additional court costs, loss of earnings and assets, and investigation of the debtors personal business. Some of the letters told the debtors to pay or see a lawyer, and that they would have no further opportunity to pay the debt voluntarily.

The undersigned accepts respondents' statement in their final brief that ". . .most people do pay their debts, that often all that is needed to motivate one to pay an obligation, or at least to contact the creditor involved, is a series of reminders which reflect a sense of urgency and importance on the part of the creditor." But reminders to the debtor must accurately and truthfully reflect the situation, and cannot convey, directly or indirectly, false or misleading impressions. If the reminders are of no value in collections without misrepresentation then reminders as a system of collecting debts

cannot be countenanced. As the Supreme Court said in *FTC* v. *Colgate-Palmolive, supra,* at 390–391: [39]

> . . .we think it inconceivable that the ingenious advertising world will be unable, if it so desires, to conform to the Commission's insistence that the public be not misinformed. If, however, it becomes impossible or impractical to show simulated demonstrations on television in a truthful manner, this indicates that television is not a medium that lends itself to this type of commercial, not that the commercial must survive at all costs.

There is, of course, no reason flat rate letter services for debt collection cannot be lawfully marketed. Two cases do show the requirement for carefully scrutinizing the messages sent in the course of such services. In *S. Dean Slough* v. *FTC,* 396 F.2d 870 (5th Cir. 1968), *cert. denied,* 393 U.S. 980, *affirming* 70 F.T.C. 1318, the respondent marketed a variation of the flat rate service in that he sold debt collection forms to businessmen. These were later remailed under respondent's letterhead and address, thus deceptively implying that a third-party had been engaged to collect the debt. The statements made in *S. Dean Slough's* forms were similar in a number of respects to statements made in TWA's forms. *S. Dean Slough* was prohibited from representing directly or by implication that ". . . any delinquent account had been referred to it for collection," and from representing that ". . . any legal or other actions will be instituted to effect collection" 70 F.T.C. at 1368. The Commission further noted in *S. Dean Slough,* at 1358, that third party referral is an effective debt collection device because the debtor feels the creditor has assigned the account for legal action. To the extent that the third party is not in a position to sue, the use of a third party's name and address for the collection of a debt "is wholly grounded in deception." *Helix Marketing Corporation,* 3 CCH Trade Reg. Rep. ¶20,368 (1973) [83 F.T.C. 514], is also in point. It involved a corporation which assigned debts to a separate division with a different name for collection to give its debtors the impression that the account had been assigned to an outside collection agency. The corporation was prohibited from representing that legal action will be taken unless it is taken in all cases, or that legal action may be taken unless it is [40] taken in a *majority* of cases. Respondents attempt to distinguish *Helix* by arguing that because in *Helix* the assignor and assignee were the same corporate person, there could be no question in the minds of the individuals running the collections division as to what the parent corporation would, in fact, do to collect the debt. There is no merit in respondents' attempt to distinguish this case from *Helix.* TWA sells its flat rate service as a

series of form letters to be sent to debtors, and no legal action is planned or taken during this series.

Floersheim v. *FTC, supra,* is a case where the debt collectors' actions were more egregious than those of TWA in that the debt collection notices were made to simulate legal documents, and were sent by Floersheim from Washington, D.C., to give the notice an official government aura. Nevertheless, the Commission's findings in that case are pertinent here. The Commission found "that vague references to state laws permitting attachment of various types of property had a tendency to deceive . . .," and that the " 'sole purpose of including this catalog of creditors' rights is to intimidate and deceive the debtor, rather than to inform him of the legal rights of his creditor.' " *Floersheim,* at 877. Moreover, Floersheim was prohibited from giving the impression that a third party, other than the creditor, was interested in the debt.

Respondents counter that they are required by state law to catalogue possible extra costs to the debtors should legal action be taken. The language which is suggested for use by the California Bureau of Collection and Investigative Services is as follows:

> You are advised that we intend to commence legal action against you. This action can result in a judgment against you which will include the actual cost of . . . filing fees and . . . actual cost of service of process (Watkins, Tr. 153; RX 5, p. 6).

However, according to the testimony of the former Chief of California's Bureau of Collection and Investigative Services, this requirement was passed by the California legislature as a consumer protection [41] measure because of the peculiarity of California's court system and was directed at regular third party collection measures *not* flat rate services. He testified that the reason for the rule is that in California collection agencies cannot sue in small claims courts, and the legislators wanted debtors to know that, even though the amount of the debt was small, once the account was assigned to a collection agency, the account would be sued in regular court where costs could be assessed against the losing party (Bishop, Tr. 230–231). The particular language quoted above was suggested because some collection agencies abused the notification requirement (Bishop, Tr. 231–232; RX 5, p. 6).

V

REMEDY

Respondents raise a threshold First Amendment question in

regard to the order which has been proposed by complaint counsel. First Amendment attacks upon Commission orders are not novel. See *Murray Space Shoe Corporation* v. *FTC, supra,* at 272; *Regina Corporation* v. *F.T.C. supra,* at 770. There is now no question that commercial speech is protected by the First Amendment, *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976), but there is no protection for false and misleading speech. "The power of the Federal Trade Commission to restrain misleading, as well as false statements . . . has long been recognized." *Young* v. *American Mini Theatres, Inc.,* 427 U.S. 50, 69 (1976). There is obviously no constitutional right to disseminate false or misleading statements. *FTC* v. *National Commission on Egg Nutrition,* 517 F.2d 485 (7th Cir. 1975). In view of the recent decision in *Beneficial Corp.* v. *FTC,* 542 F.2d 611, 619 (3rd Cir. 1976), any order which restricts commercial speech must be as precise as possible and should be no more broad "than is reasonably necessary to accomplish the remedial objective of preventing the violation."

The words "nature," "import" and "urgency" in the abstract have ranges and shades of meaning when applied to possible future communications of respondents in their debt collection activities which, in the veiw of the undersigned, are too imprecise to serve as a proper guideline. Therefore, the proposed order has been narrowed in this respect. [42]

Disclaimer

Respondents vehemently object to the disclaimer contained in the "Notice" order for inclusion in all of the letters sent by respondents in their flat rate service. The disclaimer is as follows:

> This communication is a reminder of creditors' claim. Trans World Accounts, Inc., does not take any legal action against the debtor during the letter writing series.

The undersigned is of the opinion that the foregoing disclaimer would be extremely confusing to recipients of TWA's communications. The disclaimer does not state clearly TWA's relationship with its creditor clients and has the capacity to leave the misleading impression that TWA has been engaged to pursue all avenues of collection and has complete authority to sue. The debtor, furthermore, not only does not know how many letters are included in the "letter writing series" but, until a number of communications have been received, would not necessarily even understand the phrase "letter writing series."

It is without question that the Commission has broad discretion in

framing an order to insure that law violations will not continue, so long as there is a reasonable relation between the violation and the remedy. *FTC* v. *Colgate-Palmolive supra; FTC* v. *National Lead Company,* 352 U.S. 419 (1957); *Jacob Siegel Co.* v. *FTC,* 327 U.S. 608 (1946). And where necessary the Commission can require affirmative disclosures. *Ward Laboratories, Inc.* v. *FTC,* 276 F.2d 952 (2nd Cir. 1960), *cert. denied,* 364 U.S. 827. In the opinion of the undersigned, the disclosures here are not only unnecessary but would obscure and render less valuable the truthful representations compelled by the order. *Alberty* v. *FTC,* 182 F.2d 36 (D.C. Cir. 1950), *cert. denied,* 340 U.S. 818. [43]

VI

ORDER

It is ordered, That respondents, Trans World Accounts, Inc., a corporation, its successors and assigns, and its officers, and Floyd T. Watkins, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the offering for sale, sale or distribution of any service or printed matter for use in the collection of, or attempted collection of, or for assisting in the collection of, or for inducing or attempting to induce the payment of, alleged delinquent debts in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using or placing in the hands of others for use, envelopes, letters, forms or any other materials which by their appearance, content, or otherwise, misrepresent that they are telegrams or a telegram.

2. Using or placing in the hands of others for use, envelopes, letters, forms or any other materials which by simulating telegrams or other methods or forms or types of communication misrepresent the nature, import, or urgency of any communication.

3. Misrepresenting directly or by implication, that legal action with respect to an alleged delinquent debt has been, is about to be or may be initiated, or misrepresenting in any manner the imminency of legal action.

4. Engaging in any misrepresentations in communication with alleged delinquent debtors, or placing in the hands of [44] others for use in communicating with alleged delinquent debtors, letters, forms, or any other materials, which contain misrepresentations.

5. Placing in the hands of others the means and instrumentali-

ties to accomplish any of the matters prohibited in this order, or which fail to comply with the requirements of this order.

It is further ordered, That the respondent corporation shall distribute a copy of this order to each of its operating divisions or departments and to each of its present and future officers, agents, representatives, or employees engaged in any aspect of the offering for sale, sale or distribution of any service or printed matter for use in the collection of, or attempted collection of, or for assisting in the collection of, or for inducing or attempting to induce the payment of, alleged delinquent debts, and that said respondent secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That the respondent corporation notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his employment with Trans World Accounts, Inc., and of his affiliation with a new business or employment. In addition, the individual respondent named herein shall promptly notify the Commission of his affiliation with a new business or employment whose principal activities include the offering for sale, sale or distribution of any service or printed matter for use in the collection of, or attempted collection of, or for assisting in the collection of, or for inducing or attempting to induce the payment of, alleged delinquent debts, or of his affiliation with a new [45] business or employment in which his own duties and responsibilities involve the offering for sale, sale or distribution of any service or printed matter for use in the collection of, or attempted collection of, or for assisting in the collection of, or for inducing or attempting to induce the payment of, alleged delinquent debts. Such notice shall include individual respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the respondents herein shall, within sixty (60) days from the date this order becomes final, and periodically thereafter as required by the Federal Trade Commission, file with the Commission a written report setting forth in detail the manner and form of their compliance with this order.

Dissenting Statement of Commissioner Collier

In my opinion the record proof fails to support any reasonable interpretation that Trans World Accounts (TWA) threatened debtors with imminent and likely lawsuits. The challenged communications generally followed a two-part format. In the first part, TWA demanded immediate payment and sometimes demanded to be contacted by the debtor as an alternative to payment. In the second part TWA advised debtors (or suggested to them) that a failure to make the payment demanded "may" result in a lawsuit, sometimes an "immediate" one.

This record does not show that TWA's clients never brought lawsuits, "immediate" or otherwise. Three of the four of these clients who testified said either that they sued or that TWA sued for them. (Tr. 205–06, 210–12, 256.) The fourth client was not asked whether his employer sued. (Tr. 171–78.)

It cannot be discerned from this record, even in general terms, how much time elapsed between the sending of the letters that mentioned a lawsuit and the subsequent decision to sue. The majority concludes that a lawsuit is not "imminent" if it is not initiated during the letter series. I find no support in the record for placing this meaning on TWA's letters, and the record proof regarding clients' litigation policies is in disarray. The client witness who was asked the most probing questions about his firm's policy testified as follows:

> Question (by complaint counsel): But if they—suppose a debtor has not responded at all after the first, second or third, would you let the series go to its conclusion?
>
> Answer (by Mr. Anderson of Beckman Instruments): Yes. That's our policy.
>
> Q. Then you would decide whether to bring a lawsuit; is that correct?
>
> A. Yes, unless we heard through other sources, either from a salesman that goes by and sees them moving out of the building, or some evidence that would indicate that, "Hey, they're closing up." Then we'd stop the service and file suit. (Tr. 257.)

[2] This hardly proves that lawsuits were not brought before the series expired.[1]

What were the chances of a lawsuit when the challenged letters went out and afterwards? What were the determinants? Were they different between respondents' "commercial" and "non-commercial"

[1] The same client earlier testified:

"If . . . the customer says, 'Well, look, there isn't any way that I can pay you because at the advice of counsel we're thinking seriously of filing bankruptcy, we have such a cash flow problem that we really don't know whether we're going to stay in business,' we'll stop the TWA service and immediately turn the account over to an attorney." (Tr. 250.)

clients? In all these matters, the Commission is asked to resolve silence against the respondents.[2]

If the communications had told debtors that the respondents or their clients would definitely sue, or even, that they would probably sue if payment were not made, complaint counsel might have proved its case. But the respondents were careful to say only that a lawsuit "may" be brought.

In deciding for liability, the majority gives "may" a statistical meaning that runs against common usage. Although the majority purports to do this only for the sake of clarifying the order, it is clear that this statistical conception of "may" is the root of its finding of liability. The word "may" usually conveys uncertainty of a fairly elastic nature, [3] and I think that it must have been understood in this way by the debtors who received the respondents' letters. So far as it is used to express volition, "may" conveys the absence of a present intention—certainly not the presence of one, as the majority suggests. Unlike the situations that we sometimes face where communications are hurled in staccato rhythm at partially attentive audiences of mass media, one can reasonably assume that readers of the morning mail will read and understand the common meaning of simple words.

The majority's decision effectively regulates the word "may" out of respondents' vocabulary, at least insofar as it can be used by them to express the possibility of a lawsuit. If respondents can establish that a debtor has a 51 percent chance of being sued, I do not see why they wouldn't say, "You will probably be sued" rather than "You may be sued." (Unless, or course, the majority also intends to establish a regulatory meaning for "probably" beyond what is commonly comprehended by that word.)

The public policy reasons that dictate this reworking of the English language are obscure to me. There is a public interest in consumers knowing that they may be sued, and possibly assessed costs, in time to head off the consequences.[3] If the majority believes

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[2] Rather than on the testimony, which was inconclusive, complaint counsel may be relying on respondents' admission that certain communications mentioning the possibility of a lawsuit "were sent by Trans World Accounts, Inc. to debtors in instances where the creditor had not assigned the debts involved to Trans World Accounts, Inc. until after the final notice in the series had been sent." CX 40 at p. 6, CX 41c. This does not prove that TWA's clients did not bring suit during the series, assuming *arguendo* that to be the relevant time period. Moreover, there was evidence and the ALJ found that "currently, TWA receives an assignment of the debt before the first letter is mailed in about 80–90 percent of all flat rate sales." I.D. 10. There was evidence that two years before trial this figure was 60 to 70 percent. (Tr. 70.)

[3] A California statute, which governs a substantial part of respondents' operations, effectively conditions a debt collector's recovery of costs in municipal and justice courts upon his prior notice to the debtor that the debt collector "intended to commence legal action against the defendant and that legal action could result in a judgment against the defendant which would include the costs and necessary disbursements. . . ." Cal. Code Civ. Proc. § 1031 (Deering's Ann. Supp. 1977). Obviously, this is a consumer protection measure, and I do not see that the interest that it guarantees is less important when a suit is only possible.

that there will be time enough to locate debtors in a class that will probably be sued, I don't know the basis for that belief. A debtor may be more likely to have the means to pay a debt over a longer period of time than over a shorter one. I do not think we earn the gratitude of those consumers who will receive the shorter "notice periods" and quicker litigation decisions that the majority's language convention may inspire. Even if the long-term consequences of our language reform efforts are nil, as those who leave their debts unpaid learn not to trust the absence of mention of a lawsuit, there are bound to be some short-term costs of this reeducation process.

[4] Having concluded that the text of the letters contains no misrepresentation, I believe that there is no public interest in entering and enforcing an order against respondnets' practice of styling these communications "telegrams," "Trans-O-Grams" and the like.[4]

Clearly TWA would be permitted to call their communications telegrams if they had paid the price to Western Union. Western Union may—or may not—have a private right of action for TWA's conduct.[5] In the ordinary trademark infringement case, the trademark holder's private right of action can protect the important interest that consumers have in getting what they have chosen, an interest that we also have a duty to protect. *See FTC* v. *Algoma Lumber Co.*, 291 U.S. 67 (1934); *but see FTC* v. *Klesner*, 280 U.S. 19 (1929). Here, however, the case is different. There is no question that TWA's clients got what they chose, and the recipients of these communications were not in a position to choose whether they were to receive a Trans World telegram (or Trans-O-Gram) or a Western Union telegram, because the recipients obviously were not buying the communications. The nature of the consumer injury in this case must be on a different plane than in the ordinary trademark infringement case. It is not apparent exactly what this consumer injury is. Surely it is not merely that respondents failed to pay Western Union.

[5] The majority writes that respondents' practice of calling their communications telegrams is material, because "the obvious conclu-

[4] The reach of the majority's holding on this issue is unclear. The record, buttressed by our experience in reviewing marketing practices, indicates that [fill-in-the-blank]-O-Grams are often used in promotional activities, ranging from soliciting political campaign contributions to sales of products. RX 7-19.

[5] Mr. Michael Borsella, patent and trademark attorney for Western Union, seems to admit in his affidavit that "the word 'telegram' is a dictionary word in the public domain." He objects not to the use of the word "telegram" but to the use of that word "on a spurious telegraphic format *together with a number of proprietary features ordinarily embodied in one or more of Western Union's formats.*" (emphasis in original) CX 43c. *See also* CX 43d. While this objection may be more valid with regard to respondents' original "telegram" communication (CX 43e, CX 43f), it seems very weak with regard to the "Trans-O-Gram" format. *See Western Union Telegraph Co.* v. *ITT World Communications, Inc.*, 164 U.S.P.Q. 651 (Patent Office Trademark Trial and Appeal Board 1970) (editorial description).

sion to be drawn from the receipt of a demand to pay, telegraphically communicated at substantial cost, is that precipitous action may follow if immediate response to the message is not made." Presumably this "immediate response" would be either payment of the debt or some communication by the debtor to the creditor.

There is no evidence on this record that shows that TWA's practice of styling its communications as "telegrams" induced consumers to pay their debts or communicate with their creditors. Two consumer affiants gave evidence of their impressions of respondents' communications.

> Affiant Semien: When my mother first showed me the billing notice, I thought it was a real telegram until I read it and realized it was a fake. (CX 44a.)
>
> Affiant Pere: When I first received the collection notices, I thought they were real telegrams sent by Western Union. (CX 45a.)

Both of these statements make clear to my mind that any misimpression was temporary and did not last long enough to induce payment or other prejudicial action by the debtor. A third consumer testified to the same effect:

> Question (by respondents' counsel): [Y]ou received a Trans-O-Gram from Trans World Accounts?
>
> Answer (by Mr. Doolittle): That's correct.
>
> Q. And the first thing you wondered is whether it was something similar to a Mailgram?
>
> A. That's correct.
>
> Q. How long did that frame of mind exist?
>
> A. Until I opened it. (Tr. 47–48.)

On this evidence I am not willing to find as a matter of expertise that respondents' use of the telegram or Trans-O-Gram format was a "material" deception, even assuming that it was a deception at all. *See FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965). At most, these symbols on the envelope may have led readers to be more attentive to the contents, but this ephemeral reaction is not the sort of public injury that I had thought Congress had charged the Commission with preventing.

[6] The ALJ held that an incorrect "initial impression" is enough to make a violation, whether or not this initial misimpression induced any action.[6] I.D. at 32–33. The "first contact" cases that he cites do not go so far as to read the materiality requirement out of

[6] The ALJ found that the telegram format may have actually induced one consumer to work out an installment payment program. I.D. at 33. I reject this finding. The consumer to whom the ALJ refers is affiant Semien whose statement quoted *supra* indicates that she was disabused of her initial misimpression as soon as she opened the envelope.

Section 5. In each, the initial misimpression induced or could have induced consumers to take some action to their prejudice, such as taking a trip to the store, *Carter Products, Inc.* v. *FTC*, 186 F.2d 821, 824, (7th Cir. 1951), consenting to a deceptive sales presentation, *FTC* v. *Standard Education Society*, 302 U.S. 112, 115 (1937), or answering a deceptive offer of employment, *Progress Tailoring Co.* v. *FTC*, 153 F.2d 103, 104–05 (7th Cir. 1946).

Because, in my view, the text of the letters were not proved false and the use of the telegram format did not cause material deception, I would dismiss the complaint.

I believe that this result is consistent with the soon-to-be-effective Fair Debt Collection Practices Act, Pub. Law 95–109, which will comprehensively regulate deception and unfairness in the debt collection industry.

There is nothing in the Act or in its legislative history to suggest that the general prohibitory sections[7] set different standards for deception and unfairness than Section 5. Because I do not believe that respondents cognizably violated Section 5, I do not believe that they have violated these general sections.

[7] Neither did the respondents violate the specific prohibitions of the Act. Section 807(5) prohibits "the threat to take any action that cannot legally be taken or is not intended to be taken." Nothing that the respondents said about the possibility of a lawsuit could reasonably be construed as a "threat," at least giving that term its plain meaning as Congress apparently intended.[8]

There are two specific provisions in the new Act that might be argued to bar the "telegram" and "Trans-O-Gram" formats. Section 807(9) prohibits "the use or distribution of any written communication . . . which creates a false impression as to its source . . . ." I do not believe that respondents misrepresented the "source" of their communications within the meaning of the Act. Even if a consumer thought a Trans World telegram were a Western Union telegram, he would not be mistaken as to the source, because Western Union is a medium of messages, not a source of them. (CX 43c.) A consumer could not possibly doubt from any of the respondents' communica-

[7] Section 807 provides: "A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." Section 808 provides: "A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt."

[8] The Act expressly prohibits the Commission from interpreting its terms through administrative regulations. Fair Debt Collection Practices Act, Section 814(d). *See* S. Rep. No. 95–382, 95th Cong., 1st Sess. 6 (1977) [hereinafter cited as "Senate Report."] This feature was stressed in the House debate. 123 Cong. Rec. H2921 (daily ed. April 4, 1977) (remarks of Rep. Annunzio); 123 Cong. Rec. H2928 (daily ed. April 4, 1977) (remarks of Rep. Evans).

tions on this record that the source was TWA. Moreover, both the prohibitory language associated with the language quoted above[9] and the Senate Report[10] make clear that the evil addressed by this provision is the practice of some debt collectors passing themselves off as government officials, attorneys or credit bureaus. There is no allegation of this kind of deception here.

The second specific provision that might be relevant to the respondents' practice of calling their communications telegrams and Trans-O-Grams is Section 808(8) which prohibits "using any language or symbol, other than the debt collector's [8] address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business." The interest protected by this provision is obviously the consumer's privacy from the awareness of others that he owes an uncollected debt. As the Senate Report explains, the section prohibits "using symbols on envelopes indicating that the contents pertain to debt collection." There would be little sense, from the perspective of avoiding deception, to read this section to permit use of the word "telegram" on the letter to the debtor and forbid it on the envelope.[11] Unless the respondents' use of the telegram and Trans-O-Gram formats links in the public mind their communications to the business of debt collection, I do not see how their use offends this subsection. Moreover, since this subsection expressly permits debt collectors to send telegrams, I cannot see how TWA's conduct contravenes its policy.

The majority clearly interprets respondents' statements to mean something different than my interpretation of them. If this were a case of a merchant describing his products in language susceptible of misunderstanding, I might be inclined to take another view. In such a case we are entitled to infer injury from the mere fact of misunderstanding of a material aspect of the transaction. *FTC* v. *Algoma Lumber Co.*, 291 U.S. 67, 78 (1934). But here the injury is more remote: it is the possibility that a debtor might because of his misunderstanding pay an unjust debt. In my view, the respondents' proven conduct does not make this a substantial risk. In any event, the real risks of this injury are regulated far more effectively by the

[9] The subsection 807(9) reads in full: "The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.

[10] Senate Report at 8.

[11] This reading of subsection 808(8) is reinforced by subsection 804(5) which governs collector communications to third parties (not the debtor) and forbids the use of identifying symbols on both the envelope and the letter.

new Fair Debt Collection Practices Act than they will be by the majority's order.

OPINION OF THE COMMISSION

BY DIXON, *Commissioner:*

The extraction of money owed from the pockets of those who owe it is a necessary, if not universally revered occupation in a society, like ours, whose growth and prosperity depend so heavily upon the extension of credit. Worthy ends, nonetheless, cannot excuse means which slide beyond education, persuasion, and exhortation into the realm of deception and unfairness. This case involves allegations of such overreaching by a large West Coast collection agency.

Respondents are Trans World Accounts, Inc., (hereinafter Trans World), a full-line collection agency, which contacts over 100,000 consumers per year, and Floyd T. Watkins, its principal shareholder and guiding light. The complaint in this matter, issued in October 1975, charged that respondents had used two sorts of misrepresentations in a series of form [2] notices and letters sent to debtors in an effort to induce payment. Respondents were first alleged to have sent communications in a "yellow window envelope" with the word "TELEGRAM" printed in large black type over the window and on the reverse side. The notice inside was alleged to be a "yellow printed form, styled TELEGRAM." The complaint further alleged that these simulated telegrams misled recipients as to the nature, import, purpose, and urgency of the message they contained. The complaint also charged that statements in the messages to debtors represented that legal action was about to be, or might be taken against the recipients by their creditors when in fact legal action with respect to the debt would not be taken at all during the course of sending the series of form notices and letters, if ever.

A trial was held before Administrative Law Judge (ALJ) Daniel Hanscom who entered an initial decision sustaining the allegations of the complaint and recommended an order to cease and desist. This matter is before the Commission upon the appeal of respondents from the ALJ's decision.

Like many collection agencies, Trans World will take assignment of delinquent accounts, make contact with the debtor, and attempt to collect the debt, retaining as its fee a fixed percentage (often 50 percent) of any amounts recovered. A more commonly employed offering is a series of form letters which may be purchased by creditors for a "flat rate" and are mailed to debtors by Trans World

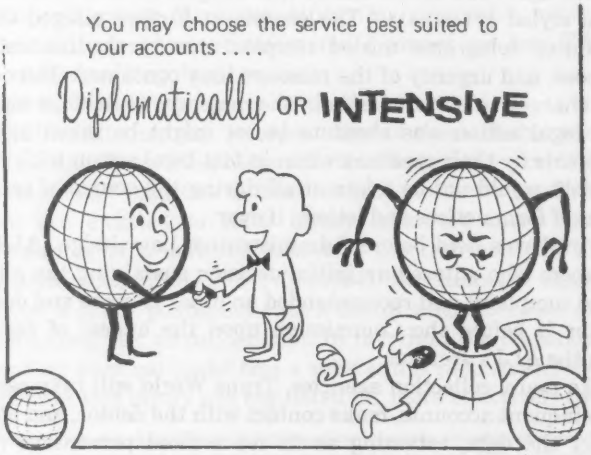
over a period of time, typically 85–90 days for a six letter series and 60–70 days for a five letter series. (I.D. 9.)[1] Trans World offers "diplomatic" and "intensive" [3] dunning notices to suit the varied corporate philosophies of its customers.[2] Both series hint, in diplomatic or "intensive" prose, at dire consequences that may befall a debtor who neglects to pay up, but typically the only consequence to afflict a person who ignores one letter is the receipt of another, and another until the flat-rate series is exhausted. Should the debtor pay at any point he or she may be sent, at the creditor's option, a message of thanks. (I.D. 8.)

I. TELEGRAM

A review of the record leaves no doubt that certain of respondents' collection notices were misleading because they simulated telegraphic communications. The overwhelming similarities between respon-

[1] The following abbreviations are used herein:
I.D. — Initial Decision, Finding No.
I.D. p. — Initial Decision, Page No.
Tr. — Transcript of Testimony, Page No.
CX — Complaint Counsel's Exhibit No.
RX — Respondents' Exhibit No.

[2] CX 3(b). The diplomatic and intensive approaches are graphically portrayed in Trans World's promotional materials:



dents' "telegrams" and Western Union's are set forth in the initial decision at I.D. 15.

[4] Affidavits of two consumers obtained by complaint counsel and admitted into evidence (CX 42a) indicated that these people believed that communications they received from Trans World were telegrams. (CX 44a, 45a,b.) One affiant apparently concluded upon further inspection that the communications were fake (CX 44a); it is unclear whether or not the other one did before being contacted by complaint counsel (CX 45a).

In any event, the deception here is a paradigm of the sort which does not require the testimony of consumers to prove, *e.g., FTC* v. *Colgate-Palmolive Co.* 380 U.S. 374, 391–2 (1965); *Carter Products, Inc.* v. *FTC,* 323 F.2d 523, 528 (5th Cir. 1963). Our own inspection of exhibits CX 35–37 and 23–25 leaves no doubt that they are designed to look like telegrams and would likely be thought upon casual inspection to be telegrams by many people. Indeed, even after careful study, it is not likely to be apparent to one who has not recently received a real telegram what the differences are.

The materiality of the deception is, moreover, manifest. We take judicial notice that on some occasions money speaks louder than words. A creditor would not spend $7.95 to convey a message when 13 cents might suffice, unless the message being sent were of the utmost importance and urgency. The obvious conclusion to be drawn from the receipt of a demand to pay, telegraphically communicated at substantial cost, is that precipitous action may follow if immediate response to the message is not made.

The law judge entered two order provisions (paragraphs 1 and 2) addressed to the deceptive telegram count. Paragraph 1 prohibits respondents from using or placing in the hands of others materials which misrepresent that they are telegrams or a telegram. Respondents do not question the applicability of this provision if an order is to be entered. Respondents do, however, object to Paragraph 2 which prohibits the use or placement in the hands of others of materials which

> by simulating telegrams or other methods or forms or types of communication misrepresent the nature, import, or urgency of any communication.

[5] We believe this paragraph is entirely appropriate "fencing in," designed to prevent recurrence in slightly altered form of the violation proven. *Jacob Siegel Co.* v. *FTC,* 327 U.S. 608, 611 (1946); *Fedders Corp.* v. *Federal Trade Commission,* 529 F. 2d 1398 (2d Cir.), *cert. denied* 429 U.S. 818 (1976). Indeed, there is evidence of record that the misrepresentation proven has already occurred in slightly

different form. Following their discontinuance of the "telegram" format in 1975 respondents switched to the "Trans-O-Gram," a blue and white missive which looks suspiciously like a Western Union Mailgram.[3] That the Trans-O-Gram bears striking resemblance to the Mailgram is further apparent from the testimony of one of respondents' own witnesses, who apparently had trouble telling the difference:

> Question [by Respondents' Counsel]: Now, as a portion of your accounts receivable operation, do you utilize Trans World Accounts, Incorporated?
>
> Answer: Yes, we do.
>
> Q. And what portions of their services do you utilize?
>
> A. Well, we use both the Mailgram—not Mailgram—Trans—what's that thing called?
>
> Q. Trans-O-Gram.
>
> A. Trans-O-Gram. (Tr. 172–173; *See also* Tr. 46.)

Witness Stark's confusion is understandable. It is apparent to us that the current Trans-O-Gram format is simply a less flagrant variation of the fake telegram scheme previously employed. Respondents ask in their brief whether the second paragraph of the order prohibits their use of [6] the Trans-O-Gram format. For purposes of assisting them in interpreting the order we reiterate the answer of the ALJ: "Yes."

Respondents are entirely free to attract the debtor's attention with all manner of non-deceptive, eye-catching pictures, colors or words.[4] The order contains no prohibition upon use of such exhortations as "Important Message" to call the reader's attention to what respondents believe to be a communication deserving serious consideration. What is deceptive, however, is for respondents to attempt to convince their readers that a message is of such urgency or importance that they have taken particular pains or spent extra money to deliver it, *when in fact they have not.* We think the order as framed by the ALJ is sufficiently explicit in this regard, but should respondents remain honestly in doubt as to whether any particular format would run afoul of the order, Section 3.61(d) of the Commission's Rules of Practice permits them to obtain an advisory opinion to allay their uncertainty.

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[3] A message unit that is telegraphically communicated to the general locale of the recipient, and mailed from there. (RX 2.)

[4] These remarks apply to any *letter* sent to a debtor as opposed to the envelope in which it is sent. In redesigning their envelope, respondents must take account of our order as well as the Fair Debt Collection Practices Act, Pub. Law No. 95–109, 15 U.S.C. 1692 (1977) to take effect shortly. That Act apparently proscribes the use of "any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business." [§808(8), 15 U.S.C. 1692f] The dissent concludes that a much narrower reading of these words is warranted than their literal significance suggests. We intimate no view on the scope of this provision at this time, but it obviously warrants respondents' attention.

II. IMMINENCE OF LEGAL ACTION

We think there can be no question that some of respondents' communications were intended to, and had the capacity to convince their readers that legal action to collect a debt was imminent, when in fact it was not. While it appears that respondents sought to avoid certain of the flagrant express misrepresentations that have characterized cases of this sort in the past, the message they did get across differed very little. What, for example, is a reader likely to understand by these words: [7]

> Urgent — Appear at Claimant's office within four days to pay above claim or protest your liability. Failure to appear in person or have legal counsel represent you may result in immediate litigation by our client with ultimate seizure of property, auto, bank accounts and other personal assets if judgment is obtained. (CX 22, I.D. 31.)

or these:

> You are hereby directed to appear at our client's office at 9:00 A.M. next Tuesday to protest liability of the above claim. Failure to comply may result in immediate commencement of litigation by our client. If judgment is granted, property, including monies, automobile, credits and bank deposits now in your possession could be attached. If our client receives payment in full prior to the time of protest as scheduled, your appearance will not be required. (CX 21b, I.D. 28.)

or these:

> Urgent — Immediately contact our client and make arrangements for payment. Imperative to avoid further action which may be taken against you under provisions of state statutes. If settlement is not made within 5 days after receipt of this telegram, you may wish to consult your attorney regarding your legal liability. (CX 25c, I.D. 24.)

Other examples are cited and analyzed by the administrative law judge at I.D. 24–31.

With respect to the overwhelming majority, if not all of those to whom the above letters were sent, it is evident that neither respondents nor their creditor-clients had any intention of bringing suit in the event that the letters were ignored. Instead, another letter in the series would be sent routinely. Only when the flat rate series and perhaps additional collection techniques (I.D. 39) had been exhausted (a process that would typically consume a period of months) would accounts be re-evaluated from the standpoint of possible legal action, which might or might not be commenced depending upon the size and other characteristics of the claim. (I.D. 33–42.)

[8] The dissenting statement cites the testimony of one client of

Trans World who indicated (apparently in reference to commercial debtors) that if he discovered that a debtor were about to file for bankruptcy or close up shop this client might cancel the letter writing series and commence legal action (Tr. 250, 257). Such an occurrence, however, would clearly be fortuitous and wholly unrelated to the failure of the debtor to respond to any of Trans World's threats of immediate legal action. As the dissent observes, this same client testified that in the event a debtor ignored one or more letters in the series, the client's policy was to allow the series to run to conclusion before deciding whether to bring a lawsuit. Other clients of Trans World testified to identical effect (Tr. 177, 205, 215), which is consistent with the testimony of Mr. Watkins himself as to how the flat-rate service was designed to operate.

Far from being "in disarray," we believe that the record in this case makes perfectly clear that the intention of Trans World (whether or not it had an assignment of the debt) and of Trans World's creditor-clients when undertaking the flat-rate series was to exhaust the series (which would typically consume 60 to 90 days) before deciding whether to take or not take further action in particular cases.[5] Nevertheless, having made no evaluation of individual files to determine whether legal action in any particular case would be warranted; knowing nothing about an account except that it was "delinquent;" not having determined whether the debtor refused to pay because he or she had a legitimate complaint, because he or she had lost a job and was not able to pay, or because he or she was a "deadbeat;" and despite the [9] absence of any present intention on its own part or that of its creditors to take any action, Trans World threatened people with the possibility of being immediately taken to court unless they paid "immediately," "within five days," "within four days," "by 9:00 A.M. next Tuesday" or whenever it would strike the fancy of Trans World's letter writers to threaten. We fail to perceive how this can constitute acceptable conduct under a law that prohibits misrepresentations affecting commerce.

Nor do we believe that the use of the word "may" in Trans World's statements as recited on page 7 of this opinion and in the initial decision serves to diminish the deception. This conclusion is not

[5] Given the testimony of Trans World's president as to how its flat-rate service was designed to work, complaint counsel were not obliged to call every creditor-client of Trans World in order to prove that the service did work in this way. In fact, several creditors testified that it was their policy not to interrupt the series, *i.e.*, not to act where threats of immediate action were ignored. In response to this testimony, Trans World introduced no evidence to suggest that *any* creditor ever took immediate action against *any* debtor in response to the debtor's failure to heed one of Trans World's contrived deadlines.

based on our assignment of an unusual meaning to the word "may" but rather upon the plain meaning of the letters in evidence.[6] A person reading these letters would clearly perceive himself or herself to be in some danger of being named defendant in a lawsuit if payment were not made by the deadlines indicated in the letters. It would never occur to any reader who took the words seriously that neither the writer nor its client intended to do anything other than send another letter if the threat were ignored.

[10] As noted above, a worthy end does not justify deceptive means. And a false threat of immediate legal action is highly deceptive. If we had to guess at one class of debtors that might be least likely to be deceived by false threats of legal action we suspect it would be the deadbeats who from long experience probably recognize that such claims are indeed mere "bluff and bluster." Others, however, lacking extensive experience with the collection agent, may be more impressed, perhaps to the point of becoming upset or seeking to pay in situations where they may have a legitimate defense to the debt, or for reasons beyond their control be unable to afford it. All three of complaint counsel's witnesses in this case, one in person and two by affidavit, testified to a feeling of at least temporary or longer lasting distress upon receiving respondents' communications. (CX 44, 45, Tr. 30–31, 46). Where such distress results from a truthful reminder of an arguably legal debt it is an unavoidable cost of a credit society; where, however, the injury results from a misleading threat of impending litigation, the seriousness and imminence of which is further misrepresented by a format which suggests telegraphic or other expedited communication, the Commission is obliged to intervene.[7]

[11] Paragraph 3 of the order speaks to the misrepresentation of

[6] In succeeding paragraphs we discuss one means by which respondents may assure themselves of using the word "may" non-deceptively in complying with the order entered herein prohibiting misrepresentations of the imminence and likelihood of legal action. This is done in response to respondents' request for guidance as to the meaning of the ALJ's proposed order. However, respondents' *liability* is predicated upon their use of threats that immediate legal action "may" occur in situations where the record shows absolutely no intention to take immediate legal action.

[7] Although the legitimacy of the claims asserted by Trans World against its debtors is irrelevant to the legitimacy of its tactics, we do note that the witness called by complaint counsel in this case had several clearly formidable defenses to his alleged debt. (Tr. 44–45, 47.) That notwithstanding he received a series of five letters from Trans World. In the second (CX 48) the writer assured the alleged debtor that if payment were not received he would request that the account be transferred to Trans World's attorney for collection. In the third (CX 49a) the alleged debtor was warned that if payment were not sent the account would be referred to an attorney for legal action within 7 days. In the fourth letter the alleged debtor was told to make immediate payment because the author, this time an attorney, "has no authority to withhold further processing or proceedings" (CX 50), the significance of which in the context of CX50 and the earlier letters is abundantly clear. The final letter (CX 51), (dated 29 days after the second letter threatening legal action within 7 days), warned the alleged debtor that his last chance had come, and that "legal assignment and authorization for suit has been requested or has already been obtained." No suit was ever filed. Respondents' counsel stated at oral argument that the foregoing letters were part of respondents' "percentage collection" as opposed to flat-rate, service. They nevertheless contain deceptions.

legal action. As modified by the Commission it would prohibit respondents from misrepresenting the imminence of legal action, and from misrepresenting that legal action has been, is about to be or may be initiated or otherwise misrepresenting the likelihood of such action.[8] Respondents do not question the propriety (if an order is to be entered) of that portion of the paragraph prohibiting misrepresentations of the imminence of legal action, and there can be no doubt that it speaks directly to the violation alleged and proven at trial. The order language pertaining to misrepresentations of the likelihood of legal action is, we think, necessary to prevent recurrence of the violation proven at trial in a very closely related form, *e.g., FTC* v. *Mandel Bros., Inc.*, 359 U.S. 385, 393 (1959); *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 611 (1946). An order which prohibited respondents from threatening a debtor with an immediate lawsuit for nonpayment would be of little value if it did not also prevent respondents from threatening the debtor with legal action at an unspecified future time, when in fact such legal action was not being contemplated by the collector or creditor and was not likely ever to be taken.

In their briefs respondents have professed concern over their asserted inability to apply a prohibition against misrepresenting that legal action "may be initiated." The quoted language is substantially identical to that contained in numerous litigated and consent orders entered by the Commission in the past, *e.g., Providence Washington Insurance Co.*, Dkt. 9063 (May 3, 1977) [89 F.T.C. 345]; *United Compucred Collections, Inc. et al.*, 87 F.T.C. 542 (1976); *Trans National Credit Corporation et al.*, 87 F.T.C. 549 (1976); *Continental Collection Bureau of America, Inc. et al.*, 87 F.T.C. 557 (1976); *North American Collections, Inc. et al.*, 87 F.T.C. 566 (1976); *Power's Service, Inc. et al.*, 87 F.T.C. 574 (1976); *Continental Collection Service, et al.*, 87 F.T.C. 582 (1976); *G.C. Services Corp. et al.*, 83 F.T.C. 1521 (1973); *The Hearst Corporation, et al.*, 82 F.T.C. 1792, 1797 (1973), and we do not believe that it should present undue problems [12] in effecting compliance. Indeed, we believe that respondents are much more adept than they acknowledge at determining what meaning alleged debtors are likely to take from their communications. The essence of Trans World's business, after all, is communicating with people, using words to convey a message. As communicators respondents are doubtless aware that the meaning conveyed by words often exceeds or diverges from their

[8] Upon our own review we have added the generalized reference to misrepresenting the "likelihood" of legal action, which is merely designed to encapsulate the purpose of the ALJ's proposed prohibition against misrepresenting that legal action "has been, is about to be, or may be" initiated.

literal significance, and a debt collector may not exploit this disparity to deceive, using words which a defense lawyer might be able to argue are literally true but which convey a false message to the reader. See *J. B. Williams Co.* v. *FTC*, 381 F.2d 884, 889 (6th Cir. 1967); *Murray Space Shoe Corp.* v. *FTC*, 304 F.2d 270, 272 (2d Cir. 1962).

On the other hand, we do not agree with complaint counsel that the order entered herein should be read to prohibit necessarily any reference to legal action in respondents' flat rate letter series. But such references must be carefully and selectively employed to avoid deception. Respondents should not state or imply that legal action *will* be taken unless they indeed take such action in *all* cases wherein the threat of legal action is not met by payment. *Helix Marketing Corporation, et al.*, 83 F.T.C. 514 (1973). And respondents should not state or imply that legal action *may* be taken unless they can demonstrate from their experience that suit is the *ordinary* response to nonpayment. *Cf.* Fair Debt Collection Practices Act, Pub. Law No. 95-109, §805(c)(2); 15 U.S.C. 1692c (1977). For purposes of the guidance respondents have solicited, suit in more than half the instances on nonpayment will suffice under this order to substantiate a claim that legal action may be taken, *Helix Marketing Corp., supra.*

In complying with the foregoing standard, respondents would do well to treat discernible classes of alleged debtors differently, depending upon the likelihood that members of each class will be sued. Unsatisfied claims of a particular client or clients should not be lumped together for the purpose of establishing that legal action is taken in more than 50 percent of all cases where it is the practice to treat different classes of claims in different ways. For example, there is record testimony suggesting that claims below a certain small amount are not ordinarily pursued by some creditors in court. (Tr. 78-79.) If that is the practice then letters used to collect such small debts should not [13] contain references to legal action (except in a particular case where the file has been reviewed and a decision to sue has been made). On the other hand, if it is true, as respondents' counsel indicated at oral argument, that it is the corporate policy of some clients to pursue nearly all unsatisfied claims, even small ones, through the courts, references to the possibility of eventual legal action would be appropriate in a series of letters drafted for such clients.

Distinguishing among discernible classes of debtors can also provide a way for respondents to make mention of possible legal action in a non-deceptive fashion where it might otherwise be

improper. For example, when serving a creditor whose policy is to sue infrequently, respondents might nonetheless be able to make non-deceptive mention of possible legal action in some cases by separating out a class of claims that their non-litigious client would ordinarily pursue (for example, bad checks written for large amounts). In all instances, however, respondents when making any reference to possible legal action must avoid misrepresentation of its imminency. References to specific deadlines by which payment must be made or references to the need for haste, urgency, immediate action or whatever, coupled with references even to tentative legal action, will inevitably convey the impression that legal action impends. Such an approach is wholly improper in a series of form letters that are mailed over a period of weeks or months without any determination to sue in any particular case having been made.

Finally we reiterate that if respondents remain genuinely in doubt as to the propriety of any particular proposed course of action they may obtain Commission advice pursuant to Section 3.61(d) of the Commission's Rules of Practice.

III. PROHIBITION ON ALL MISREPRESENTATIONS

The ALJ accomodated what appears to have been respondents' principal concern at trial by deleting a provision requiring an affirmative disclosure in their collection notices. Complaint counsel have not appealed from the ALJ's determination and we, therefore, have not considered its propriety in this case. The ALJ, however, added a provision, not present in the notice order, which would prohibit the making of any false statement in connection with the collection of a debt. Under the particular circumstances of this case we believe this paragraph is not [14] warranted. In framing an order to cease and desist the Commission may, of course, go beyond the technical confines of the violation alleged and proven, to "fence in" the violator by proscribing conduct of the same general type as that which has occurred, *e.g., FTC* v. *Mandel Bros. Inc., Jacob Siegel Co.* v. *FTC, Fedders Corp.* v. *Federal Trade Commission, supra.* Paragraph 2 of the law judge's order is an excellent example of this.

It is also, in some cases appropriate to fence in unlawful conduct by means of the broader sort of prohibition on misrepresentations contained in the law judge's proposed paragraph 4, *cf. Southern States Distributing Co., et al.,* 83 F.T.C. 1125, 1162–63 (1973). Where, for example, a wide variety of misrepresentations have occurred, or misrepresentations have recurred despite promises or orders to stop them, a broad blanket prohibition on misrepresentations would be warranted. Here, however, we believe that paragraphs 1–3 and 5

adequately address the violations found to have occurred, as well as related violations to which respondents might turn to achieve the same results. Accordingly we shall delete the ALJ's proposed paragraph 4 from the order we enter.[9]

In all other respects the initial decision disposes ably of respondents' contentions and is affirmed and adopted as the decision of the Commission.

FINAL ORDER

This matter has been heard by the Commission upon the appeal of respondents' counsel from the initial decision and upon briefs and oral argument in support thereof and opposition thereto, and the Commission, for the reasons stated in the accompanying Opinion, has substantially denied the appeal.

It is ordered, That pages 1–42 of the initial decision of the administrative law judge are hereby adopted as the Findings of Fact and Conclusions of Law of the Commission.

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

It is further ordered, That the following order to cease and desist be hereby entered: [2]

ORDER

It is ordered, That respondents, Trans World Accounts, Inc., a corporation, its successors and assigns, and its officers, and Floyd T. Watkins, individually and as an officer of said corporation, and respondents, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the offering for sale, sale or distribution of any service or printed matter for use in the collection of, or attempted collection of, or for assisting in the collection of, or for inducing or attempting to induce the payment of, alleged delinquent debts in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using or placing in the hands of others for use, envelopes, letters, forms or any other materials which by their appearance, content, or otherwise, misrepresent that they are telegrams or a telegram.

2. Using or placing in the hands of others for use, envelopes,

[9] We must remind respondents, however, that their counsel's victory on this point is largely pyrrhic, since the soon to be effective Fair Debt Collection Practices Act forbids debt collectors to use any "false, deceptive, or misleading representation or means in connection with the collection of any debt." Pub. Law No. 95–109, §807, 15 U.S.C. 1692 (1977).

letters, forms or any other materials which by simulating telegrams or other methods or forms or types of communication misrepresent the nature, import, or urgency of any communication.

3. Misrepresenting directly or by implication, that legal action with respect to an alleged delinquent debt has been, is about to be, or may be initiated, or otherwise misrepresenting in any manner the likelihood or imminency of legal action.

4. Placing in the hands of others the means and instrumentalities to accomplish any of the matters prohibited in this order, or which fail to comply with the requirements of this order.

[3] *It is further ordered,* That the respondent corporation shall distrubute a copy of this order to each of its operating divisions or departments and to each of its present and future officers, agents, representatives, or employees engaged in any aspect of the offering for sale, sale or distribution of any service or printed matter for use in the collection of, or attempted collection of, or for assisting in the collection of, or for inducing or attempting to induce the payment of, alleged delinquent debts, and that said respondent secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That the respondent corporation notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his employment with Trans World Accounts, Inc., and of his affiliation with a new business or employment. In addition, for a period of ten years from the effective date of this order, the individual respondent named herein shall promptly notify the Commission of his affiliation with a new business or employment whose principal activities include the offering for sale, sale or distribution of any service or printed matter for use in the collection of, or attempted collection of, or for assisting in the collection of, or for inducing or attempting to induce the payment of, alleged delinquent debts, or of his affiliation with a new business or employment in which his own duties and responsibilities involve the offering for sale, sale or distribution of any service or printed matter for use in the collection of, or attempted collection of, or for assisting in the collection of, or for inducing or attempting to induce the payment of, alleged delinquent debts. Such notice shall include individual respondent's current

business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

It is further ordered, That the respondents herein shall, within sixty (60) days from the date this order [4] becomes final, and periodically thereafter as required by the Federal Trade Commission, file with the Commission a written report setting forth in detail the manner and form of their compliance with this order.

Commissioner Collier dissenting.

IN THE MATTER OF

GRAND SPAULDING DODGE, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2914. Complaint, Oct. 25, 1977 — Decision, Oct. 25, 1977

This consent order, among other things, requires a Chicago, Ill. automobile dealer to cease failing to furnish in a timely manner Spanish-speaking customers with relevant bilingual disclosures and documents. Additionally, the firm is required to display notices in Spanish as set forth in the order, and to maintain prescribed records for a period of two years.

Appearances

For the Commission: *Robert C. Goldberg.*

For the respondent: *Howard Alterman, Spivack & Lasky,* Chicago, Ill.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that Grand Spaulding Dodge, Inc., a corporation, violated Section 5 of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Grand Spaulding Dodge, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 3300 W. Grand Ave., Chicago, Illinois.

PAR. 2. Respondent is now, and for some time last past has been engaged in the advertising, offering for sale, sale and distribution to the public of new and used automobiles.

PAR. 3. In the course and conduct of its business, as aforesaid, respondent has engaged in and is now engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondent purchases for resale new automobiles from Chrysler Corporation located in Detroit, Michigan and used automobiles from individuals and others. Respondent causes these products, when purchased by them, to be transported from the place of manufacture or purchase to their business establishment located in Illinois.

In addition, respondent has disseminated and has caused to be

disseminated advertisements concerning said products in newspapers and radio broadcasts of interstate circulation.

Said advertisements, presented in both the English and Spanish language, have been disseminated for the purpose of inducing the purchase of respondent's merchandise by the general public.

PAR. 4. In the course and conduct of its business as aforesaid, and for the purpose of inducing consumers who only speak, read, write or understand Spanish to purchase its products, respondent has disseminated and has caused to be disseminated, in commerce, advertisements in the Spanish language and, in a substantial number of instances, has caused its sales personnel to conduct oral sales presentations to such consumers in the Spanish language.

PAR. 5. In the further course and conduct of its business as aforesaid, and for the purpose of facilitating the purchase of its merchandise, respondent regularly arranges for credit to be extended to retail purchasers.

In connection with said credit transactions, respondent utilizes contracts, documents, notices, forms or other legal instruments which are printed predominately in the English language.

PAR. 6. In the further course and conduct of its business as aforesaid, respondent fails to provide customers who only speak, read, write or understand Spanish, or whose predominant language is Spanish, with a complete and accurate translation in Spanish of all the documents normally executed and provided to customers in connection with credit sales, or which are required by law to be provided to customers in connection with such sales at the time of the transaction.

PAR. 7. Respondent's failure to provide customers who only speak, read, write or understand Spanish, or whose predominant language is Spanish, with a full and complete translation in Spanish of all the documents described in Paragraph Six hereof, deprives a substantial number of Spanish-speaking consumers, many of whom have been induced to deal with respondent as a result of respondent's advertisements or sales presentations in Spanish, of the opportunity to receive full and adequate disclosure of the terms and conditions of any agreements they have entered into, of their rights and obligations under such agreements, and of other written information or notices normally provided to consumers at the time of the transaction.

Therefore, the acts and practices of respondent, as set forth in Paragraphs Five and Six hereof, were and are unfair, misleading and deceptive.

PAR. 8. In the course and conduct of its aforesaid business, and at

all times mentioned herein, respondent has been, and is now, in substantial competition in commerce, with corporations, firms and individuals in the sale of new and used automobiles of the same general kind as those sold by respondent.

PAR. 9. The aforesaid acts and practices of the respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in or affecting commerce and unfair and deceptive acts and practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Chicago Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of the Commission Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Grand Spaulding Dodge, Inc. is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Illinois with its office and principal place of business located at 3300 West Grand Ave., Chicago, Illinois.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Grand Spaulding Dodge, Inc., a corporation, its successors and assigns and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, and distribution of new and used automobiles in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist, in connection with credit sales in which the sales presentation has been conducted in whole or in part in Spanish, from:

1. Failing to furnish consumers with complete and accurate translations in Spanish of any documents, notices or disclosures normally provided to consumers in connection with respondent's credit sales at the time of the transaction.

2. Failing to furnish to consumers executing any contracts, agreements or other documents in connection with such credit sales, a complete and accurate translation in Spanish of each such writing, prior to the execution of the same.

Provided, however, that nothing in this order shall be understood to apply to sales receipts or other documents which serve merely as a memorandum of sales and do not, in themselves, contain covenants, disclaimers or other provisions defining the rights and responsibilities of the parties.

Further provided, that respondent must comply with subparagraphs 1 and 2 of this order by providing consumers either with:

a. bilingual documents containing all the provisions and disclosures in both English and Spanish, or

b. separate documents containing complete and accurate translations in Spanish of each English language document, and which shall contain in a clear and conspicuous manner in the Spanish language, the following heading in boldface 10 point type:

READ THIS FIRST

THIS IS A TRANSLATION OF THE DOCUMENT OR DOCUMENTS YOU HAVE RECEIVED OR ARE ABOUT TO SIGN.

It is further ordered, That respondent shall display, in at least two different locations on its premises, one of them being the location

where consumers usually execute consumer credit instruments or other legally binding documents, the following notice in Spanish:

NOTICE TO SPANISH SPEAKING CUSTOMERS

IF YOU ARE A SPANISH-SPEAKING CONSUMER AND THE SALES PRESENTATION WAS MADE, IN WHOLE OR IN PART IN SPANISH, YOU ARE ENTITLED TO RECEIVE A SPANISH TRANSLATION OF THE CREDIT CONTRACT AND OF THE OTHER DOCUMENTS RELATED TO THE FINANCING OF YOUR PURCHASE BEFORE YOU SIGN ANYTHING. DO NOT SIGN ANY DOCUMENTS UNTIL YOU HAVE RECEIVED AND READ THE SPANISH TRANSLATIONS.

It is further ordered, With respect to each account in which translations in Spanish are provided, as required herein, that respondent shall maintain in its files, for a period of two years, statements signed by respondent's consumers acknowledging receipt of such translations.

It is further ordered, That respondent deliver a copy of this order to cease and desist to all operating divisions and to all present and future personnel of respondent engaged in making sales presentations and in the consummation of any consumer credit transactions.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the operation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That no provision of this order shall be construed in any way to annul, invalidate, repeal, terminate, modify or exempt respondent from complying with agreements, orders or directives of any kind obtained by any other agency, or act as a defense to actions instituted by municipal or state regulatory agencies. No provision of this order shall be construed to imply that any past or future conduct of respondent complies with the rules and regulations of, or the statutes administered by the Federal Trade Commission.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

GOLD BULLION INTERNATIONAL, LTD., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND HOBBY PROTECTION ACTS

Docket 9094. Complaint, Jan. 17, 1977 — Decision, Nov. 1, 1977.

This consent order, among other things, requires B.H. Mayer's Kunstprageanstalt of Pforzheim, West Germany, a manufacturer of imitation numismatic items, to cease manufacturing, distributing or importing into the United States imitation numismatic items which are not conspicuously and permanently marked "copy", as required by federal regulations.

Appearances

For the Commission: *Justin Dingfelder* and *Ronald G. Isaac.*

For the respondents: *William H. Bogart, Bogart & Andrews,* Syracuse, N.Y. and *Michael A. Stachowski,* Buffalo, N.Y.

COMPLAINT

Pursuant to the provisions of the Hobby Protection Act (15 U.S.C. 2101, *et seq.*), and the Federal Trade Commission Act (15 U.S.C. 41, *et seq.*), and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Gold Bullion International, Ltd., a corporation, and H. Kenneth Costello, Walter N. Thompson and William H. Bogart, individually and as officers of said corporation, and B.H. Mayer's Kunstprageanstalt, a corporation, and Bernhard H. Mayer, individually and as an officer of said corporations, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Gold Bullion International, Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 216 State Tower Building, Syracuse, N.Y.

Respondent H. Kenneth Costello, Walter N. Thompson and William H. Bogart are officers of the corporate respondent Gold Bullion International, Ltd. They formulate, direct and control the acts and practices of said corporate respondent. Their business address is the same as that of said corporate respondent.

Respondent B.H. Mayer's Kunstprageanstalt is a corporation

existing and doing business under and by virtue of the laws of the Federal Republic of Germany, with its principal office and place of business located at Turnplatz 2, Pforzheim, West Germany.

Respondent Bernhard H. Mayer is an officer of the corporate respondents. He formulates, directs and controls the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondent, B.H. Mayer's Kunstprageanstalt.

PAR. 2. Respondents are now and for some time in the past have been engaged in the manufacture, importation, sale and distribution of various items of merchandise, including imitiation numismatic items, to dealers and others for resale to the public.

PAR. 3. In the course and conduct of their business as aforesaid, respondents now cause and for some time in the past have caused imitation numismatic items to be imported into the United States and shipped from their place of business in the State of New York to retailers and others located in various other states in the United States. Respondents therefore maintain, and at all times mentioned herein have maintained, a substantial course of trade in said items in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents, subsequent to November 29, 1973, have imported into the United States for distribution in commerce copies of privately minted five (5), ten (10), and twenty (20) German Reichmark gold coins, privately minted fifty (50) Mexican Peso gold coins, privately minted one hundred (100) Austrian Corona gold coins, and other privately minted gold coins. The aforesaid coins are imitation numismatic items as defined in Section 7 of the Hobby Protection Act. Said coins were not marked "copy" as required by Section 2(b) of said Act.

PAR. 5. Respondents' aforesaid acts and practices, as alleged in Paragraph Four hereof, were and are in violation of the Hobby Protection Act. Such violation is, pursuant to Section 2(b) of the Hobby Protection Act, an unfair and deceptive act or practice in or affecting commerce under the Federal Trade Commission Act. Pursuant to Section 4(b) of the Hobby Protection Act, the aforesaid acts and practices of respondents constituted and now constitute a violation of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereto with violation of the Hobby Protection Act and the Federal Trade C0mmission Act, as

amended, and the respondents having been served with a copy of that complaint, together with a proposed form of order; and

The respondents B.H. Mayer's Kunstprageanstalt, a corporation, and Berhard H. Mayer, individually, and as an officer of said corporation, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having withdrawn the matter from adjudication in accordance with Section 3.25 of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the proceedure described in Section 3.25 of its Rules, the Commission hereby makes the following jurisdictional findings, and enters the following order:

1. Respondent B.H. Mayer's Kunstprageanstalt is a corporation organized, existing and doing business under and by virtue of the laws of the Federal Republic of Germany with its principal office and place of business located at Turnplatz 2, Pforzheim, West Germany.

Respondent Bernhard H. Mayer is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent B.H. Mayer's Kunstprageanstalt, a corporation, its successors and assigns, and its officers, and Bernhard H. Mayer, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacture, importation or distribution in or affecting commerce of any imitation numismatic item, as "imitation numismatic item" is defined in the Hobby Protection Act (Pub. Law 93-167, 15 U.S.C. 2101, *et seq.*), do forthwith cease and desist from:

Importing, manufacturing or distributing any imitation numismatic item that is not plainly and permanently marked "COPY" as required by Section 2(b) of the

Hobby Protection Act and the regulations promulgated thereunder. The word "COPY" shall appear in conformance with 16 C.F.R. 304.6, *i.e.*, in capital letters in the English language, incused in sans-serif letters having a vertical dimension of not less than two millimeters (2.0 mm) and a minimum depth of three-tenths of one millimeter (0.3) or to one-half (1/2) the thickness of the reproduction, whichever is the lesser. The minimum total horizontal dimension of the word "COPY" shall be six millimeters (6.0 mm).

It is further ordered, That respondent corporation shall forthwith distribute a copy of this order to each of its corporate affiliates in the United States.

It is further ordered, That respondents notify the Commission at least 30 days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries in the United States, or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment doing business in the United States. In addition, for a period of ten years from the effective date of this order, the respondent shall promptly notify the Commission of each affiliation with a new business or employment whose activities include the manufacture in the United States, or the importation into the United States, of numismatic items, or of his affiliation with a new business or employment in which his own duties and responsibilities require him to reside in the United States or to be present in the United States on a regular basis. Such notice shall include the respondent's new business address and a statement of the nature of the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

CITY STORES COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2910. Complaint, Nov. 1, 1977 — Decision, Nov. 1, 1977

This consent order, among other things, requires a New York City retail department store chain to cease imposing unauthorized collection fees on delinquent charge accounts and to provide such disclosures and refunds as are set forth in the order.

Appearances

For the Commission: *Richard H. Gateley* and *Russell A. Benghiat*, Consumer Protection Specialist.

For the respondent: *Stuart M. Rosen, Weil, Gotshal & Manges*, New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that City Stores Company, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent City Stores Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 500 Fifth Ave., New York, New York. Respondent, through its divisions and wholly-owned subsidiaries, operates approximately one hundred forty-nine (149) department, specialty, and home furnishing stores, as well as certain collection agencies.

PAR. 2. Respondent City Stores Company is responsible for the formulation, control, and direction of the policies and practices of its divisions and subsidiaries, including the acts and practices hereinafter set forth.

PAR. 3. Respondent City Stores Company sells and distributes merchandise in commerce by operating and controlling retail department, specialty and home furnishing stores in a number of states, and by causing merchandise to be shipped from its warehouses and retail department stores for distribution to, and purchase by,

the general public located in states other than those from which such shipments originate. By these and other practices, respondent maintains, and at all times mentioned herein has maintained, a substantial course of business in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the ordinary course and conduct of its aforesaid business, respondent permits many customers of its retail stores to charge purchases. Customers charge their purchases pursuant to a credit agreement with respondent, which provides, among other things, for payment by the customer of attorney's fees and court costs if the customer's account is referred to an attorney who is not a salaried employee of respondent for collection.

PAR. 5. Respondent customarily provides to each charge account customer a monthly statement setting forth the amount of the balance in the account. In some instances, respondent's charge account customers have failed to make timely payments on their accounts. Respondent's Franklin Simon and Lit Brothers divisions, after internal collection efforts, in certain instances have added a twenty percent (20%) collection fee to accounts upon referring accounts to a collection agency (other than to an attorney who is not a salaried employee of respondent). The collection fee was imposed contrary to the terms of respondent's agreement with the customer since the account had not been referred to an independent attorney for collection. Respondent has, through such acts and practices, collected various amounts from customers.

PAR. 6. The aforesaid acts and practices of respondent have had, and now have, the capacity and tendency to mislead members of the purchasing public into the payment of a collection fee contrary to the terms of respondent's charge account agreement with customers. Respondent has thereby caused certain of its charge account customers to be deprived of substantial sums of money rightfully theirs.

PAR. 7. The aforesaid acts and practices of respondent, set forth in Paragraphs Five and Six above, were and are all to the prejudice and injury of the public and of respondent's competitors, and constituted, and now constitute, unfair methods of competition in or affecting commerce and unfair or deceptive acts and practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption

hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Cleveland Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by the respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent City Stores Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 500 Fifth Ave., New York, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding, and of the respondent, and the proceeding is in the public interest.

ORDER

For the purpose of this order, the term "unauthorized collection fee" refers to any fee, penalty or default charge which was collected by respondent prior to the date on which this order becomes final and which did not meet the requirements of subparagraphs (A) and (B) of paragraph (1) of this order.

It is ordered, That the respondent, City Stores Company, a corporation, and its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the handling of customer charge accounts, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Imposing any fee, penalty or default charge on accounts which respondent considers delinquent or uncollectable or with respect to which collection procedures have been instituted unless:

(A) the imposition of the fee, penalty or charge is authorized by law; and

(B) the amount, or method of computing the amount of the fee, penalty or charge has been clearly and conspicuously disclosed to the customer in the Retail Installment Credit Agreement, or other credit agreement, prior to the consummation of the transaction.

Provided, that, the disclosure requirements of this paragraph are not applicable to any fee, penalty or charge awarded by a court or imposed by a judgment entered by a court.

(2) Failing to disclose the amount, or method of computing the amount of any default, delinquency, or similar charges payable in the event of late payments as required by Section 226.8(b)(4) of Regulation Z, 12 C.F.R. 226.8(b)(4), in the manner and form required by that regulation.

(3) Failing to disclose the conditions under which any charges other than finance charges may be imposed on an account and the method by which they will be determined as required by Section 226.7(a)(6) of Regulation Z, 12 C.F.R. 226.7(a)(6), in the manner and form required by that regulation.

(4) Failing to send the disclosures and make the refunds required by this order.

It is further ordered, That, with respect to each unauthorized collection fee in excess of one dollar ($1.00) which respondent has at any time heretofore imposed on a customer and which has been collected from any such customer, on or after February 4, 1974, or which is collected at any time subsequent thereto:

1. Respondent shall refund to each such customer the full amount of such fee:

(i) within sixty (60) days of the date this order becomes final, respecting all fees heretofore collected (unless such fee has previously been refunded); and

(ii) within 30 days after receipt, respecting any such fees which may be collected subsequent to the date of this order; and

2. Respondent shall make a clear and conspicuous disclosure which shall state:

REFUND

The enclosed check represents a refund of a collection fee which you paid as part

of a previous bill. Since our account agreement with you does not provide for such a charge, we are refunding the amount of the collection fee.

Each refund shall be given to the customer either in person or by mail, and shall be in the form of a check payable to the order of the customer. The check shall be sent to the last known address shown in respondent's records for said customer. If any such check is returned to respondent with a notification to the effect that the customer to whom it was mailed is not located at the address to which it was sent, respondent shall remail the check, with an address correction request, to the Post Office unless respondent has already done so. If the check or statement which has been remailed is returned to respondent and the amount to be refunded exceeds fifteen dollars ($15.00), respondent shall obtain from a credit bureau the most current address available for the customer in the credit bureau's files by means of an in-file report or other credit bureau report. If the customer is not located by the preceding methods, respondent shall thereafter be relieved of any further obligation to send any additional notice and/or any refund with respect to the collection fee in question; *provided, however,* that in the event said customer should subsequently request such refund, respondent shall, within thirty (30) days from the date of such request, provide the disclosures and refund the collection fee in accordance with the provisions of this order.

It is further ordered, That respondent shall, upon request, produce for the purpose of examination and copying by representatives of the Federal Trade Commission, all records pertinent to disclosures and refunds made pursuant to this order.

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions and subsidiaries.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondent shall, within sixty (60) days after the service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

STANDARD OIL COMPANY (OHIO)

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8910. Complaint, Jan. 18, 1973 — Decision, Nov. 2, 1977

This consent order, among other things, requires a Cleveland, Ohio, manufacturer of petroleum and automotive products, to cease prohibiting its dealers from obtaining non-gasoline products from independent sources or requiring them to deal exclusively with Sohio for automotive accessories. The order requires the firm to offer its lessee dealers new agreements which comply with the terms of the order, or give notice that agreements will not be offered. Additionally, it provides that where Sohio seeks to cancel an agreement prior to its expiration for "good cause," dealer may request that determination of good cause be submitted to arbitration.

Appearances

For the Commission: *Frank Lipson* and *Jonathan Gaines.*

For the respondent: *Rufus S. Day, Jr., David A. Nelson* and *James H. Bodurtha, Squire, Sanders & Dempsey, George J. Dunn* and *Richard M. Donaldson,* all of Cleveland, Ohio.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that The Standard Oil Company (Ohio), a corporation, hereinafter sometimes referred to as respondent or as Sohio, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent The Standard Oil Company (Ohio) is a corporation organized, existing and doing business under the laws of the State of Ohio. Its executive office and principal place of business is located at the Midland Building, Cleveland, Ohio.

PAR. 2. The Standard Oil Company (Ohio) and its subsidiaries (herein collectively referred to as Sohio) engage in all phases of the petroleum business, including exploration for and production of crude oil and natural gas and the manufacture, transportation and marketing of petroleum products. Sohio also markets automobile supplies and accessories through its retail outlets. In addition, Sohio produces and sells coal, manufactures and markets plastic products

and chemicals, and operates motor inns, restaurants and a vending business.

PAR. 3. Sohio is, and for many years has been, the leading marketer of gasoline and other refined petroleum products in Ohio under the Sohio brand name. Sohio also markets such products through subsidiaries in Central and Western Pennsylvania, Southeastern Michigan, in areas of Kentucky, West Virginia and Indiana adjacent to Ohio under the Boron brand name, and in the Eastern Seaboard States under the B-P brand name. Sohio presently supplies a total of about 11,500 retail outlets, of which approximately 5,000 are owned or leased by it. Sohio operates two refineries in Ohio, one in Pennsylvania and one in Texas, and approximately 600 bulk plants and terminals. Sohio's total sales for the year 1971 were approximately $1,393,798,000.

PAR. 4. In the course and conduct of its business, Sohio has engaged in, and is presently engaged in, commerce as "commerce" is defined in the Federal Trade Commission Act. In addition to its own production, it purchases and exchanges crude oil and refined petroleum products and purchases tires, batteries and accessories from suppliers throughout the United States and causes such products to be transported from various states to other states for refining, distribution or resale by Sohio to retailers in various states.

PAR. 5. Sohio, in the course and conduct of its business as aforesaid, actively competes with other petroleum companies throughout the United States in the purchase for resale of petroleum products, tires, batteries and accessories. Sohio is also engaged in direct retail sales of petroleum products, tires, batteries and accessories, through the use of company operated retail outlets, in competition with its retail service station dealers as hereinafter defined, with other petroleum companies and their dealers, and other retailers of such products in the various States of the United States.

PAR. 6. In the course and conduct of its business as aforesaid, Sohio, in the sale of its gasoline and other refined petroleum products, tires, batteries and accessories at retail, commonly utilizes the following different methods of operation:

(1) "Company operated retail stations," including:

(a) Company operated, full facility retail stations with managers compensated by salary.

(b) Company operated, full facility retail stations with managers compensated by commission.

There are approximately 1,270 company operated, full facility retail

stations, from a total of some 3,500 Sohio retail stations in the State of Ohio and adjacent states, using the Sohio and Boron trade names.

(2) "Retail service station dealers," including:

(a) "Lessee dealers" who are either DR's (dealer rented) who operate under a one-year lease with Sohio and who purchase gasoline and other products from Sohio; or motor fuel consignment dealers who have a continuing agreement cancellable on thirty (30) days' notice, who obtain their gasoline, for payment purposes only, on consignment and who purchase other products outright from Sohio. All lessee dealers operate full facility retail stations.

(b) "Authorized dealers" who sell Sohio products using the Sohio or Boron trade names in retail outlets which they own or lease from a lessor other than Sohio in Ohio and adjacent states. These include full facility retail stations, outlets which sell motor fuel only, automobile dealers and marinas.

There are approximately 2,230 dealers, from a total of some 3,500 Sohio retail stations in the State of Ohio and adjacent states, using the Sohio and Boron trade names.

These different methods of operation of Sohio retail gasoline stations place Sohio's company operated retail stations in competition with Sohio's retail service station dealers in the sale of gasoline, other refined petroleum products, tires, batteries and accessories.

PAR. 7. It is now, and has been for a period of time, the policy of Sohio to grant to certain of its retail service station dealers temporary competitive allowances credited to the regular tankwagon price of its gasolines. The granting of such allowances generally occurs in market areas where there is a price disturbance, usually in the nature of a local or area price war.

PAR. 8. Beginning on or about March 1970, and at different times thereafter, Sohio entered into a combination, planned common course of action, agreement or understanding with certain of its retail service station dealers in the Dayton, Columbus and Lima areas and other Ohio areas, and in Pennsylvania under the terms and conditions of which the aforestated temporary competitive allowance policy of Sohio was placed into effect, maintained, and carried out.

PAR. 9. Pursuant to, and in furtherance of, the aforesaid combination, planned common course of action, understanding or agreement, Sohio, acting together and in combination with certain of its retail service station dealers, and as both a supplier and a competitor, agreed to fix and maintain, and did fix and maintain, the retail price at which gasolines were sold or were to be sold at said retail service stations, and further agreed to, and adhered to, certain

discounts, rebates, allowances, terms and conditions, upon which said gasoline would be sold to said retail service station dealers and to the purchasing public.

PAR. 10. The policy of granting such allowances is conditioned upon the retail service station dealer's agreement to accept such assistance and, in conjunction therewith, to post such prices as Sohio stipulates to correspond with the level of assistance agreed upon. Failure or refusal on the part of the retail service station dealer to post such stipulated prices is regarded by Sohio as a sufficient basis not to grant or continue such allowance or, in those cases where it has been granted, to terminate such allowance even though such allowance was then still being given to other retail service station dealers in the same competitive area.

PAR. 11. In addition, in the course and conduct of its business as aforesaid, Sohio, by the use of coercion, intimidation or threats such as, but not limited to, canceling or threatening to cancel, terminating or refusing to renew Sohio's lease with its lessee dealers, compels, and has compelled, certain of its retail service station dealers to: carry trading stamps, engage in various promotional activities, purchase exclusively or preferentially tires, batteries and accessories sold or sponsored by respondent and to adhere to required hours of operation. The effect of these practices is to make many, if not all, of such dealers subservient to Sohio as to price, hours of operation and promotional activities, or to carry, exclusively or preferentially, certain products sold by Sohio. In addition, approximately one-third (1/3rd) of the Sohio branded outlets are owned and operated by Sohio as company operated retail stations in close proximity to its retail service station dealers; and in many metropolitan areas, Sohio owns and operates in the range of forty to sixty percent (40% to 60%) of the total Sohio branded stations. Since Sohio has complete control of the hours of operation, resale prices of petroleum products, tires, batteries and accessories, promotional activities and use of trading stamps in its company operated retail service stations, the location and concentration of the company operated retail stations gives Sohio a further means of influencing, intimidating and coercing its retail service station dealers.

PAR. 12. Through its control of the lease terms and the use of one-year DR leases and a thirty (30) day termination provision in the motor fuel consignment dealer leases, Sohio disciplines many of its lessee dealers, forcing adherence to Sohio's resale prices, offer trading stamps, participate in promotions or keep the retail stations open during required hours of operation.

PAR. 13. The acts and practices alleged above, particularly those

set forth in Paragraphs Seven through Ten hereof, have had the additional effect of disciplining other gasoline suppliers and dealers which are in competition with Sohio and its dealers, and discouraging such suppliers and dealers from reducing gasoline retail prices and engaging in price competition with Sohio. All of the acts and practices as alleged above are to the prejudice of the public and constitute unfair methods of competition and unfair acts and practices within the intent and meaning of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having issued a complaint charging that the respondent named in the caption hereof has violated the provisions of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45; and

Respondent and complaint counsel having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission that the law has been violated, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 3.25 of its Rules, now in further conformity with the procedure prescribed in Section 3.25 of the Commission Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent The Standard Oil Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal place of business located at Midland Building, Cleveland, Ohio.

2. The Federal Trade Commission has jurisdiction of this proceeding and of the respondent, and this proceeding is in the public interest.

ORDER

I

For purposes of this order only, the following definitions shall apply:

A. The term *"Automotive Service Station"* or *"Station"* means a retail

service station having one, two or three service bays in operation, and engaged in the business of selling automotive gasoline, lubricants, tires, batteries, automotive accessories, and mechanical service to the motoring public.

B. The term *"Dealer"* means the operator of an *Automotive Service Station* on premises owned by SOHIO or leased by SOHIO from someone other than the *Dealer.* The term *"Dealer"* does not include employees of SOHIO; jobbers or wholesale distributors of gasoline, lubricants, tires, batteries or automotive accessories; persons who own their *Stations* or lease *Stations* from jobbers or wholesale distributors or other third parties; aviation fixed base operators, truck stop operators; or marina operators.

C. The term *"Dealership Agreement"* means all agreements (including leases and operating agreements) between SOHIO and a *Dealer* under which the *Dealer* operates an *Automotive Service Station* in the State of Ohio, or under which the *Dealer* operates an *Automotive Service Station* in any other state under the trade name "Boron" or under any successor trade name thereto.

D. The term "TBA" refers to automotive tires and tubes, automotive batteries and automotive accessories, including, but not limited to, spark plugs, oil filters, fan belts, auto lamps, fuses, windshield wipers and blades, antifreeze preparations, waxes, polishes, automotive lubricants and other items used on or in the servicing or repairing of highway automotive vehicles.

E. The term *"Effective Date of This Order"* refers to the date of issuance of the Commission's decision and order with respect to this matter.

F. The term "SOHIO" means respondent, The Standard Oil Company, an Ohio corporation, and its subsidiaries.

II

It is ordered, That SOHIO, its successors or assigns to all or substantially all of its assets, and SOHIO's officers, agents, representatives and employees directly or through any corporation, subsidiary, division or other device shall not insofar as its marketing activities are conducted in commerce or affect commerce, as "commerce" is defined in the Federal Trade Commission Act:

A. Enter into, renew or initiate an offer to enter into or renew a *Dealership Agreement* for a term of (a) less than five years if the *Dealer* has been a *Dealer* for at least the preceding three years, with the immediately preceding year being at the *Station* to which the *Dealership Agreement* relates, or (b) less than three years, if the *Dealer* has been the *Dealer* at the *Station* to which the *Dealership*

Agreement relates for at least the preceding year, or (c) less than one year in other cases, *provided, however,*

(1) that where any *Station* premises are held by SOHIO as lessee and not as owner for a period less than that required by this Paragraph II A, the term offered to the *Dealer* need not exceed the term of such underlying lease, and

(2) that in any *Dealership Agreement* the *Dealer* shall have the option to cancel such *Dealership Agreement* upon 60 days written notice to SOHIO;

B. Prohibit *Dealers,* through coercion or otherwise, from purchasing TBA products from non-SOHIO sources, or require, by contract, agreement, understanding, course of dealing, or by any means whatsoever, that *Dealers:*

(1) deal exclusively in TBA products manufactured, sold, distributed or sponsored by SOHIO or maintain any specified minimum stock of such TBA products; *provided, however,* SOHIO may require *Dealers* to maintain on the premises a representative amount of SOHIO trademarked or trade named lubricants or motor oils, or

(2) refrain from handling TBA products obtained from non-SOHIO sources, or from placing such products in such locations and in such quantities as is customary in service stations operated by SOHIO;

C. Prohibit the display on the pump island and on peripheral lamp posts, or elsewhere except in such locations as SOHIO may reasonably specify shall not be used for this purpose, of signs showing the *Dealer's* acceptance of non-SOHIO credit cards.

III

It is further ordered, That:

A. At any time within 180 days following the *Effective Date of This Order,* a *Dealer* who is operating under a *Dealership Agreement* may in writing request SOHIO to notify him whether or not he will be offered a new *Dealership Agreement.* SOHIO shall give such notice in writing within 90 days of such request. *Dealership Agreements* consistent with the terms of this order shall be offered to all such *Dealers* who have received notice of SOHIO's intent to offer them new *Dealership Agreements* and to all such *Dealers* who have received no notice whose *Dealership Agreements* are in effect 180 days after the *Effective Date of This Order.* Such agreements shall be offered within 180 days following the *Effective Date of This Order.*

B. Not more than 120 days prior to the expiration of a *Dealership*

Agreement, if the *Dealer* has not yet received notice from SOHIO as to whether or not SOHIO intends to offer the *Dealer* a new *Dealership Agreement,* the *Dealer* may request in writing such notice. If such request is made, within 60 days after receipt thereof, SOHIO shall either notify the *Dealer* that a new *Dealership Agreement* will not be offered or offer to the *Dealer* a new *Dealership Agreement* consistent with the terms of this order. The requesting *Dealer* shall be entitled to remain in the premises under the existing *Dealership Agreement* until the expiration thereof or 60 days following receipt of SOHIO's response to his request, whichever is later.

IV

It is further ordered, That:

A. During the effective period of this order, SOHIO may revoke a notice of intent to offer a new *Dealership Agreement* or cancel a *Dealership Agreement* prior to the expiration thereof only upon not less than 60 days advance written notice and for good cause. Material noncompliance by the *Dealer* with the *Dealership Agreement* shall constitute "good cause" as used in this order. Notwithstanding the provisions of this paragraph, SOHIO may cancel a *Dealership Agreement* without notice (except as provided in subparagraphs (6), (7) and (8) herein), without any right of arbitration, and without any further showing of good cause, upon the occurrence of the following events:

(1) death or legal incompetency of the *Dealer;*

(2) the institution of insolvency, bankruptcy, or receivership proceedings by or against the *Dealer,* the taking advantage by the *Dealer* of any law for the benefit of debtors, the filing of a tax lien, or the institution against the *Dealer* of lien proceedings which interfere with operation of the dealership;

(3) vacancy, abandonment of the *Station* premises, or failure to open the *Station* for the sale of gasoline, for a continuous period of 120 hours;

(4) condemnation or other taking for public purposes of the premises or a sufficient portion thereof to prevent use as an *Automotive Service Station,* including any voluntary conveyance or assignment in lieu of such condemnation or taking;

(5) any involuntary destruction of the *Station;*

(6) a decision by SOHIO to close or raze the *Station,* or sell its interest in the *Station* premises, provided that the *Dealer* is given not less than 90 days advance written notice of such decision;

(7) a decision by SOHIO to change the use of the site in such a way that it will no longer be operated as an *Automotive Service Station* provided that the *Dealer* is given not less than one year advance written notice of such decision;

(8) not less than 30 days advance written notice by SOHIO of its intention to cancel the *Dealership Agreement* in connection with divestiture made in compliance with the Final Judgment in *United States* v. *Standard Oil Co.,* No. C69-854 (N.D. Ohio);

(9) conviction of the *Dealer* of a misdemeanor committed in the course of or related to the *Dealer's* use or occupancy of the *Station,* or conviction of any felony;

(10) failure of the *Dealer* to keep in force the insurance coverage required in the *Dealership Agreement;* or

(11) failure of the *Dealer* to pay any past due indebtedness to SOHIO, after not less than 30 days written demand for payment has been made, to the extent that any such indebtedness exceeds any sum owing from SOHIO to the *Dealer.*

B. Except as specified in Paragraph IV A of this order, upon receipt of the requisite notice of intent to cancel the *Dealership Agreement,* either party may elect to invoke arbitration pursuant to the Commercial Arbitration Rules and the Procedures of the American Arbitration Association (AAA) for the purpose of determining whether good cause exists or existed for the cancellation.

C. The arbitration pursuant to Paragraph IV B of this order shall be as follows:

(1) The party invoking arbitration shall give the other party written notice of its intent to invoke arbitration within 15 days from the receipt of the notice of intent to cancel the *Dealership Agreement,* setting forth the basis for such invocation and filing two copies of said notice with the Regional Office of AAA closest to the *Dealer's* residence. If such written notice of intention to arbitrate is not made within such 15 day period, arbitration shall be deemed to have been waived. If arbitration is invoked by either party, such arbitration shall be exclusive and in lieu of any other common law rights. The locale for arbitration shall be fixed by the AAA and shall be selected from the standby facilities maintained by the AAA for arbitration. It is understood and anticipated that such locale shall be the closest available to the *Dealer's* residence.

(2) The arbitrator shall be selected by the parties from the panel of arbitrators of the AAA, and shall be appointed within 30 days from receipt by AAA of the notice of intent to invoke arbitration. The arbitrator shall be empowered to determine whether good cause for

cancellation exists or existed under the terms of the *Dealership Agreement,* to decide, in accordance with such determination, which party shall have possession of the premises, and to assess the costs of arbitration, excluding attorneys' fees (except as provided in Paragraph IV C(6)), on a just and equitable basis. The decision of the arbitrator shall be final and binding upon the parties, and judgment thereon may be entered in any court of competent jurisdiction. In the event of a default by either party in appearing before the arbitrator, pursuant to advance written notice, the arbitrator is authorized to render a decision upon the evidence of the party appearing. Within 45 days after his appointment, the arbitrator shall render a written decision on the evidence before him, which decision shall include the arbitrator's findings of fact.

(3) Subject to the provision of Paragraph IV A of this order, the *Dealer* may elect to remain in possession of the *Station* premises pending the decision of the arbitrator, and for an additional fifteen days in the event the decision of the arbitrator is against the *Dealer; provided, however,* that upon a showing by SOHIO under a motion made at any time during the arbitration that the *Dealer* has discontinued or substantially curtailed normal operations, or is disparaging SOHIO, its products, or its trademarks, the arbitrator shall be empowered to order that SOHIO may take immediate peaceable possession of the *Station* premises.

(4) The arbitrator shall have no authority except as explicitly set forth in this Paragraph IV C and shall have no power or jurisdiction to add to, subtract from, alter or modify any of the terms of a *Dealership Agreement.* If the arbitrator finds that good cause for cancellation does not or did not exist, the sole remedy he has jurisdiction and authority to award is a decision allowing the *Dealer* to continue as a *Dealer* under the terms and conditions of the existing *Dealership Agreement.* The arbitrator has no jurisdiction or authority to award monetary damages or other affirmative relief beyond deciding which party is entitled to possession of the *Station.*

(5) At any time during the arbitration proceedings, the arbitrator, upon motion by either party, shall be empowered to order the other party to post bond with a reputable bondsman or surety company or otherwise provide security to the arbitrator in an amount sufficient to cover any costs of arbitration to be borne by the parties as hereinafter provided and to cover any losses in rent, reimbursement for supplies or other damage to the leasehold during the period following the invoking of arbitration. The arbitrator shall not be empowered to make any award under the bond, but the party

protected thereby may assert his rights under the bond in any court of competent jurisdiction.

(6) In all instances each party shall bear its own attorneys' fees, except that if the arbitrator shall find that good cause for cancellation does not or did not exist, the arbitrator shall award *Dealer* a reasonable attorney's fee.

D. No *Dealership Agreement* shall require a *Dealer* to agree that any acts or omissions shall constitute material non-compliance with the *Dealership Agreement.*

V

It is further ordered, That the *Dealer's* right to elect arbitration for the purpose of determining whether good cause exists or existed for cancellation, including *Dealer's* time limitations, *Dealer's* remedies, AAA's headquarter's address and the Regional Office of AAA closest to the *Dealer's* residence as then known, shall be conspicuously noted in all *Dealership Agreements,* that express reference to the *Dealer's* right to elect arbitration shall appear on all notices of cancellation subject to the provisions of this order, and that the *Dealer's* right to request notice of whether a new *Dealership Agreement* will be offered, as provided in Paragraph III B of this order, including the actual earliest date such request may be made, shall be conspicuously noted in each *Dealership Agreement.*

VI

It is further ordered, That SOHIO shall, within 30 days after the *Effective Date of This Order,* serve upon all *Dealers* having a *Dealership Agreement* a letter by certified mail, signed by a responsible official binding SOHIO and on official SOHIO stationery, which shall include the following statement in its first paragraph:

> Sohio and the Federal Trade Commission have agreed on a consent decree which provides, among other things, for longer term dealership agreements, cancellation of which would be subject to arbitration under certain circumstances. Sohio has also agreed that its dealers will not be required to deal exclusively in TBA products sold by Sohio, to maintain any specified minimum stock of such products, or to refrain from dealing in TBA products sold by others. The relevant provisions of the consent decree are enclosed.

The relevant provisions of this order which shall be enclosed in such letters to such *Dealers* are Paragraphs I–IV hereof. The second paragraph of such letter shall contain the following statement:

> You have the right to request in writing notice from Sohio as to whether or not

you will be offered a new dealership agreement in accordance with the consent decree, and Sohio must give such notice within 90 days after receipt of your request. All dealership agreements in effect as of (insert the 180th day after *Effective Date of This Order*) must be brought into conformity with the order.

VII

It is further ordered, That SOHIO shall forthwith distribute a copy of this order to each of its marketing sales divisions and regions.

VIII

It is further ordered, That SOHIO shall notify the Commission at least 30 days prior to any proposed change in corporate organization which may affect compliance obligations arising out of this order, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries.

IX

It is further ordered, That SOHIO shall, within 210 days after service upon it of this order, and thereafter annually at the anniversary date of the order for a period of five years, file with the Commission a written report setting forth in detail the manner and form in which it has complied and will comply with this order.

X

It is further ordered, That unless altered, modified or set aside in accordance with Sections 3.71 and 3.72 of the Commission's Rules or such similar rules as may be in effect from time to time, this order shall remain in effect for 10 years after its *Effective Date.*

IN THE MATTER OF

CENTURY 21, COMMODORE PLAZA, INC., ET AL.

Docket 9088. Interlocutory Order, Nov. 2, 1977

Denial of motion for reconsideration of prior decision to deny leave to intervene.

ORDER DENYING MOTION FOR RECONSIDERATION

On October 19, 1977 the Commission denied Mr. Unterberg's appeal from the decision of the Administrative Law Judge that Mr. Unterberg be denied permission to intervene.

On the same date Mr. Unterberg filed a pleading styled "Reply to Complaint Counsel's Response to Application of David Unterberg for Review of Administrative Law Judge Parker's Order." The Commission's Rules give no right to file such a pleading. The Commission construes this pleading as a motion for reconsideration of its earlier decision, and so construed,

It is ordered, That Mr. Unterberg's motion be, and it hereby is, denied.

IN THE MATTER OF

PROVIDERS BENEFIT COMPANY, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2911. Complaint, Nov. 8, 1977 — Decision, Nov. 8, 1977

This consent order, among other things, requires a Philadelphia, Pa. consumer credit corporation and its subsidiaries to cease failing to provide consumers, in connection with the extension of credit, such material and disclosures as are required by Federal Reserve Board regulations; and to cease misrepresenting or failing to inform customers of the optional nature of credit insurance. Further, the order requires firms to offer customers the opportunity to cancel such insurance and to make appropriate refunds as specified.

Appearances

For the Commission: *Salvatore F. Sangiorgi.*

For the respondents: *Sheldon Feldman, Weil, Gotshal & Manges,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and the Truth in Lending Act and the regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that the parties identified in the caption hereof, and herein more particularly described and collectively sometimes referred to as respondents, have violated the provisions of said Acts and implementing regulation, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Providers Benefit Company is the parent corporation of Provident Credit Corp., a wholly-owned subsidiary. Provident Consumer Discount Company, Inc. is a wholly-owned subsidiary of Provident Credit Corp. All three corporations are organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania. The office and principal place of business of Providers Benefit Company is located at 8045 West Chester Pike, Upper Darby, Pennsylvania. The office and principal place of business of Provident Consumer Discount Company, Inc. and Provident Credit Corp. is located at 42 South 15th St., Philadelphia, Pennsylvania.

PAR. 2. Respondents Frederick I. Robinson and George Billings are officers of corporate respondents Provident Consumer Discount Company, Inc. and Provident Credit Corp. They formulate, direct and control the policies, acts and practices of said corporation, including the acts and practices hereinafter set forth.

PAR. 3. Respondents are now, and for some time last past have been engaged in the offering to extend, and the extension of consumer credit to the public in the Commonwealth of Pennsylvania and the State of New Jersey.

PAR. 4. In the ordinary course and conduct of its business, as aforesaid, respondents regularly extend consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 5. Subsequent to July 1, 1969, in extending consumer credit, respondents execute an "Installment Sale and Security Agreement" on which disclosures were made which failed to conform to the terminology required, and made certain other cost of credit disclosures, including the dollar amount of the finance charge, without disclosing the "annual percentage rate," thereby failing to comply with the disclosure requirements of the Truth in Lending Act as defined and set forth in Sections 226.8(a), (b), and (c) of Regulation Z. In addition, respondents furnish their customers with a separately executed "Federal Disclosure Statement" which makes disclosures under Section 226.8(d) "Loans and other non-sale credit," rather than furnishing disclosures as required by Section 226.8(c), consistent with the definition of a "credit sale" as that term is defined in Section 226.2(t) of Regulation Z.

By and through their use of the separate disclosure statements and in conjunction with a credit sale, respondents:

1. Fail to make required disclosures in a clear and conspicuous manner using the terminology as required by Section 226.6(a) of Regulation Z.

2. Fail to print the term "finance charge" more conspicuously than other terminology as required by Section 226.6(a) of Regulation Z.

3. Fail to make all of the required disclosures together on either the contract or other instrument evidencing the obligation on the same side of the page, or one side of a separate statement which identifies the transaction, as required by Sections 226.8(a)(1) or 226.8(a)(2) of Regulation Z.

4. Fail to accurately disclose the finance charge expressed as an

annual percentage rate, using the term "annual percentage rate" as required by Section 226.8(b)(2) of Regulation Z.

5. Fail to disclose the sum of the payments scheduled to repay the indebtedness using the term "total of payments" as required by Section 226.8(b)(3) of Regulation Z.

6. Fail to use the term "cash price" to describe the price at which the creditor offers, in the ordinary course of business, to sell for cash the property or services which are the subject of the consumer credit transaction as required by Section 226.8(c)(1) of Regulation Z.

7. Fail to use the term "cash downpayment" to describe the amount of the downpayment of money, using the term "cash downpayment" as required by Section 226.8(c)(2) of Regulation Z.

8. Fail to use the term "total downpayment" to describe the sum of cash downpayment in money and the downpayment in property, using the term "total downpayment" as required by Section 226.8(c)(2) of Regulation Z.

9. Fail to use the term "unpaid balance of cash price" to describe the difference between the cash price and total downpayment, as required by Section 226.8(c)(3) of Regulation Z.

10. Fail to use the term "unpaid balance" to describe the sum of the unpaid balance of cash price and all other charges which are included in the amount financed but which are not part of the finance charge, as required by Section 226.8(c)(5) of Regulation Z.

11. Fail to use the term "amount financed" to describe the amount of credit of which the customer will have actual use determined in accordance with Section 226.8(c)(7) of Regulation Z.

12. Fail to disclose the method of computing any unearned portion of the finance charge in the event of prepayment in full of an obligation which includes precomputed finance charges, a statement of the amount or method of computation of any charge that may be deducted from the amount of any rebate of such unearned finance charge that will be credited to an obligation or refunded to the customer, and if no rebate of unearned finance charges upon prepayment in full is made, the disclosure of such fact.

PAR. 6. In the further course and conduct of their business as aforesaid, respondents have charged and are now charging a substantial number of consumers for credit life and/or credit disability insurance, written in connection with consumer credit transactions.

Typical and illustrative but not all inclusive, of the circumstances in which such insurance charges are incurred by consumers are the following:

1. Prior to presenting the credit disclosure statement to the

consumer, respondents automatically include the cost of credit life and/or credit disability insurance on such statement, and unless the consumer specifically objects to the inclusion of the charges for such insurance, the coverage becomes part of the credit transaction.

2. In most instances, respondents have placed a checkmark, or "x" mark or some other mark next to blank lines on the credit disclosure statement to obtain obligor's signatures for credit life and credit disability insurance and/or have placed the date in the designated position in the insurance disclosure portion of said statement without permission or authority of the consumer.

3. Respondents record the charges for credit life and credit disability insurance as disbursements and these charges become part of the amount financed, but are excluded from the finance charge in computing the annual percentage rate, as "finance charge" and "annual percentage rate" are defined in Regulation Z.

PAR. 7. By and through the acts and practices described in Paragraph Six, and others of similar import, meaning and consequence but not specifically set forth herein, respondents, in a substantial number of instances, and particularly in connection with the sale of credit life and credit disability insurance, obtain consumers' signatures through acts and practices which operate, directly or indirectly, to defeat the elective language on the credit disclosure statements by obscuring from consumers knowledge about the option. In some instances, respondents lead consumers to believe that their signatures are necessary solely for the purpose of obtaining credit. In other instances, respondents allow consumers to sign the credit disclosure statement, electing insurance, in the mistaken belief that such insurance is required by respondents. Respondents also discourage the declination of the insurance coverage when it is questioned. These acts and practices have the effect of preventing substantial numbers of consumers from exercising their own independent, voluntary choice whether to obtain credit life and credit disability insurance.

Therefore, respondents, in a substantial number of instances, induce consumers to incur charges for credit life and credit disability insurance without said consumers making a knowing, affirmative election to have such insurance and, thereby, respondents fail to obtain from each of their customers a "specifically dated and separately signed affirmative written indication of [their] desire" to obtain such insurance, as required by Section 226.4(a)(5) of Regulation Z, in spite of the existence of language to the contrary in the credit disclosure statement.

PAR. 8. By and through the acts and practices described in

Paragraphs Six and Seven hereof, respondents fail to include the charges for credit life and credit disability insurance in the finance charge when a specific dated separately signed affirmative written indication of the consumer's desire for such insurance has not been obtained, as required by Section 226.4(a)(5) of Regulation Z, and thereby respondents:

1. Fail to compute and disclose accurately the "finance charge" as required by Sections 226.4 and 226.8 of Regulation Z; and

2. Fail to compute and disclose accurately the "annual percentage rate" accurately to the nearest quarter of one percent, in accordance with Section 226.5, as required by Section 226.8 of Regulation Z.

PAR. 9. In the further course and conduct of their business and particularly in connection with their extensions of consumer credit, respondents have charged a substantial number of consumers for automobile medical insurance and/or automobile club plan membership. The charge for this coverage is imposed directly or indirectly by respondents as an incident to or as a condition of the extension of credit. The charges or premiums are usually paid by the consumer from the proceeds of the credit transaction to the respondents. Respondents do not include the charge or premium for said coverage in the finance charge.

Therefore, respondents are violating Sections 226.4 and 226.8 of Regulation Z, by failing to include the charges for "Automobile Medical Insurance" and/or "Automobile Club Plan Membership" in the finance charge and by failing to specifically disclose such charges as an element of the finance charge.

PAR. 10. By and through respondents' failure to include the charges for "Automobile Medical Insurance" and/or "Automobile Club Plan Membership" in the finance charge as described in Paragraph Nine, respondents:

1. Fail to compute and disclose accurately the "finance charge" as required by Sections 226.4 and 226.8 of Regulation Z; and

2. Fail to compute and disclose accurately the "annual percentage rate" accurately to the nearest quarter of one percent in accordance with Section 226.5, as required by Section 226.8 of Regulation Z.

PAR. 11. Pursuant to Section 103(s) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108(c) thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Providers Benefit Company is the parent corporation of Provident Credit Corp., a wholly-owned subsidiary. Provident Consumer Discount Company, Inc. is a wholly-owned subsidiary of Provident Credit Corp. All three corporations are organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania. The office and principal place of business of Providers Benefit Company is located at 8045 West Chester Pike, Upper Darby, Pennsylvania. The office and principal place of business of Provident Consumer Discount Company, Inc. and Provident Credit Corp. is located at 42 South 15th St., Philadelphia, Pennsylvania.

2. Respondents Frederick I. Robinson and George Billings are officers of corporate respondents Provident Consumer Discount Company, Inc. and Provident Credit Corp. They formulate, direct and control the policies, act and practices of said corporations.

3. The Federal Trade Commission has jurisdiction of the subject

matter of the proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

For purposes of this order, the following definitions of terms shall apply:

(a) "Consumer credit transactions in open status" refers to those consumer credit transactions in which payments at least totaling the amount of one regular monthly payment have been made by the obligor in the last six months.

(b) "Delinquent account" refers to those accounts which are more than 30 days past due for an amount which equals the amount of one regular monthly payment.

(c) "Penetration rate" refers to the percentage of all transactions eligible for credit insurance on which charges for such insurance are made.

(d) "Refund method" refers to an accounting method to compute refunds of insurance premiums in connection with cancellation of insurance coverage which method makes use of both the Rule of 78 and a pro rata computation. As an example, the Rule of 78 would operate on a 12-month obligation as follows: The numbers 1 through 12 added together provide the figure 78. This is the denominator. The sum of the months expired at the date of cancellation supplies the numerator. The first month of a 12-month obligation is considered as 12 because the outstanding balance is 12 times as large during the first month as it is for the last month. The second month is 11, and so on to 1. The portion of insurance premiums which must be refunded, is for cancellation during the first month, 78/78–12/78 or second month 66/78–11/78 or 55/78; and so on down to the 12th month. The numerator for a 24-month contract is obtained by beginning with 24, instead of 12, as for a 12-month contract, or 36 in the case of a 36-month contract or any other number denoting the total number of months or periods in a particular contract. To the amount of any refund due in connection with any credit transaction as determined by use of the Rule of 78 will be added an amount which is equal to 40 percent of the difference between said Rule of 78 amount and that amount which would be due if said refund were to be computed on a pro rata basis. Said pro rata amount refers to an amount which shall be at least as great a proportion of the total insurance premiums collected by respondents in connection with any credit transaction as the number of remaining monthly payments, scheduled to follow the installment date nearest the date of cancellation as explained below,

bears to the total number of monthly payments scheduled by the obligor's contract. Any cancellation made on or before the fifteenth day following an installment date shall be deemed to have been made on the installment date immediately preceding the date of cancellation. Any cancellation made after the fifteenth day following an installment date shall be deemed to have been made on the installment date immediately following the date of cancellation. Any obligor making cancellation on or before the fifteenth day following consummation of the transaction shall receive a refund or credit for the full amount of insurance premiums in connection with said transaction. Cancellation for purposes of computing the amount of any refund or credit due shall be as of the date of receipt by respondents of the notice set forth in Attachment C of this order or as of the date of receipt by respondents of any other communication from the borrower under the terms of this order indicating his desire to cancel his insurance coverage.

(e) "Time of closing" refers to that period of time during which credit agreements are presented to the customer for consummation of a credit transaction whereby the customer becomes obligated to make payments to respondents to satisfy said transactions.

I

It is ordered, That respondents Providers Benefit Company, Provident Consumer Discount Company, Inc. and Provident Credit Corp., corporations, their successors and assigns, and their officers and Frederick I. Robinson and George Billings, individually and as officers of Provident Consumer Discount Company, Inc. and Provident Credit Corp., and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension of consumer credit subject to the provisions of Regulation Z (12 CFR 226) of the Truth in Lending Act (Pub. Law 90–321, 15 U.S.C. 1601–65 (1970), as amended 15 U.S.C. 1601–65a, (Supp. IV, 1974)), do forthwith cease and desist from:

1. In connection with a credit sale, as applicable:

(a) Failing to make required disclosures in a clear and conspicuous manner using the terminology as required by Section 226.6(a) of Regulation Z.

(b) Failing to print the term "finance charge" more conspicuously than other terminology as required by Section 226.6(a) of Regulation Z.

(c) Failing to make all of the required disclosures together on either the contract or other instrument evidencing the obligation on

the same side of the page, or on one side of a separate statement which identifies the transaction, as required by Sections 226.8(a)(1) or 226.8(a)(2) of Regulation Z.

(d) Failing to accurately disclose the finance charge expressed as an annual percentage rate, using the term "annual percentage rate" as required by Section 226.8(b)(2) of Regulation Z.

(e) Failing to disclose the sum of the payments scheduled to repay the indebtedness using the term "total of payments" as required by Section 226.8(b)(3) of Regulation Z.

(f) Failing to use the term "cash price" to describe the price at which the creditor offers, in the ordinary course of business, to sell for cash the property or services which are the subject of the consumer credit transaction as required by Section 226.8(c)(1) of Regulation Z.

(g) Failing to use the term "cash downpayment" to describe the amount of the downpayment of money, using the term "cash downpayment" as required by Section 226.8(c)(2) of Regulation Z.

(h) Failing to use the term "total downpayment" to describe the sum of cash downpayment in money and the downpayment in property, using the term "total downpayment" as required by Section 226.8(c)(2) of Regulation Z.

(i) Failing to use the term "unpaid balance of cash price" to describe the difference between the cash price and total downpayment, as required by Section 226.8(c)(3) of Regulation Z.

(j) Failing to use the term "unpaid balance" to describe the sum of the unpaid balance of cash price and all other charges which are included in the amount financed but which are not part of the finance charge, as required by Section 226.8(c)(5) of Regulation Z.

(k) Failing to use the term "amount financed" to describe the amount of credit of which the customer will have actual use determined in accordance with Section 226.8(c)(7) of Regulation Z.

(l) Failing to disclose the method of computing any unearned portion of the finance charge in the event of prepayment in full of an obligation which includes precomputed finance charges, a statement of the amount or method of computation of any charge that may be deducted from the amount of any rebate of such unearned finance charge that will be credited to an obligation or refunded to the customer, and if no rebate of unearned finance charges upon prepayment in full is made, the disclosure of such fact.

2. Failing, when the charges for credit life insurance, credit disability insurance, automobile medical insurance and/or club plan are not included in the finance charge for a consumer credit transaction.

(a) To present to the obligor as the first document at the time of closing, which document shall be the first document to be completed by respondents and the first document to be signed by the obligor(s) at the time of said closing in respondents' offices, or to mail to the obligor, who is consummating his credit transaction through the mail, at the same time as consummation papers are to be mailed, a separate, written, personal insurance authorization form which sets forth clearly and conspicuously:

(i) the obligor has received credit approval up to a specified amount;

(ii) the obligor's decision with regard to the various forms of insurance coverage available through respondents is not considered in granting the credit;

(iii) the purchase of any form of credit insurance is optional and is not required by the creditor, in connection with the credit transaction.

(iv) the amount of the total premium for credit life insurance, the amount of the total premium for credit disability insurance, the amount for automobile medical insurance and the amount for automobile club plan (which if elected will be added to the "amount financed");

(v) the amount financed options applicable to the transaction would result from the obligor's election to consummate the credit transaction, set forth in the following order from left to right across the document: (1) without either credit life insurance or credit disability insurance, (2) with credit life insurance only, (3) with credit disability insurance only, (4) with both credit life insurance and credit disability insurance, (5) with other available forms of credit insurance offered by respondent, except that, in addition to providing the required information for the above-stated four options, respondent need only provide the required information for one other option if the obligor has indicated an interest in such an option;

(vi) a signature and date line for each option set forth in (v) above for the obligor(s) to indicate his election;

(vii) the obligor authorizes respondents on behalf of the obligor to pay the insurance premiums to the insurance company for such insurance coverage which has been chosen.

(b) To send to mail order obligors, at the same time and along with the papers to consummate said credit transaction, a separate written statement containing the notice, in no less than 12 point bold type and easily legible, which this order requires to be displayed at respondents' office.

(c) To make the disclosures required by subparagraph (a) above on a separate document which contains no other printed or written material.

(d) To make disclosures required by subparagraphs (i), (ii) and (iii) above in not less than 12 point bold type. A form substantially in conformance with Attachment A herein will be considered as in compliance with the provisions of subparagraphs (a), (b) and (c) above. Respondents shall maintain the original statement for two years following its execution and provide the customer with an executed copy thereof.

3. Making any marks or otherwise instructing an obligor where to sign or date the separate insurance authorization form required by subsection 2(a) above in advance of the obligor's free and independent choice for such insurance.

4. Misrepresenting, orally or otherwise, directly or by implication, that credit life insurance, credit disability insurance, automobile medical insurance and/or automobile club plan membership are required as a condition of obtaining credit from respondents.

5. Discouraging, by misrepresentation, oral or otherwise, directly or by implication, the declination of credit life insurance, credit disability insurance, automobile medical insurance and/or automobile club plan membership.

6. Misrepresenting, orally or otherwise, directly or indirectly, that the obligor's failure to elect credit insurance coverage will result in a delay in processing his credit transaction or in his receiving the proceeds thereof.

7. Failing, in any consumer credit transaction or advertisement, to make all disclosures in accordance with Sections 226.4 and 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.8, 226.9 and 226.10 of Regulation Z.

II

It is further ordered, That respondents display at their place of business, at each booth, or at or near each desk or other location where transactions are consummated, in such a manner and in such dimensions so as to be easily viewed and read by the obligor from his seated or other normal position in such booth or at such desk or other location, and which shall not be in close proximity to any other written or display material, the following notice:

NOTICE TO CREDIT CUSTOMERS

THE PURCHASE OF CREDIT INSURANCE IS OPTIONAL. IT IS NOT

REQUIRED BY THIS COMPANY. YOUR DECISION IS NOT CONSIDERED IN THE GRANTING OR DENYING OF CREDIT TO YOU.

III

It is further ordered, That respondents maintain records on a state-by-state basis (covering each state in which they do business) of the penetration rate of (a) credit life insurance for transactions; and (b) credit disability insurance for transactions. Such records shall be maintained on a yearly basis and submitted to the Commission each year for a period of five years, and thereafter from time to time as the Commission may request.

IV

It is further ordered, That within forty-five (45) days after the date this order becomes final respondents mail to all existing obligors to whom credit life insurance, credit disability insurance, auto club membership and/or auto medical payment insurance, were sold prior to the date this order becomes final and the premium(s) or fee(s) for same were not included in the finance charge, and who did not receive death benefits or health benefits under said insurance policies, in connection with respondents' consumer credit transactions in open status on the date this order becomes final, notwithstanding the sale or assignment of any or all of said transactions to a third party, the two notices set forth in Attachments B and C of this order, together with a self-addressed postpaid, return envelope.

Provided, however, that: (1) respondents shall not be required to forward the two notices set forth in Attachments B and C of this order to any obligor who has already received the above-mentioned notices prior to the date this order becomes final, and where any and all follow-up provisions required by this order with respect to said notices, including the making of refunds or the crediting of accounts, where applicable, have been or will be accomplished by respondents within the time periods specified in this order; and (2) respondents shall not be required to forward the two notices set forth in Attachments B and C of this order to any obligor who, for any transaction consummated prior to the date this order becomes final, received from respondents during the time of closing of said transaction, the personal insurance authorization form required by Section 2(a) of this order and where any and all requirements connected with said form as required by this order have been accomplished by respondents.

V

It is further ordered, That a record of mailing by respondents of the notices set forth in Attachments B and C of this order be kept by respondents and that said record be available for examination by Commission personnel in connection with any compliance obligations arising out of this order. Respondents' obligations under Paragraph IV of this order shall not be fulfilled until each obligor affected by such paragraph has received the notices, or been contacted, as specified therein; *provided, however,* that respondents shall be deemed to have complied with said Paragraph IV if respondents can demonstrate that they expended reasonable efforts, in writing or orally, to deliver such notices or make such contact according to the terms of this order.

VI

It is further ordered, That all requests for refunds of credit life insurance and/or credit disability insurance premiums under the terms of this order be calculated by respondents based on the "Refund Method" as defined in subpart (d) of the definitions of this order; and all requests for refunds of premiums for auto club and auto medical insurance coverage be calculated by respondents on a pro rata basis; and that said refunds be accomplished by respondents within thirty (30) days of receipt by respondents, within the time period specified in this order, of the notice set forth in Attachment C of this order or receipt by respondents of any other form of communication from obligors indicating their desire to cancel their coverage.

VII

It is further ordered, That respondents shall make refunds in cash to all obligors requesting refunds, except those obligors whose accounts are "delinquent accounts." Respondents shall have the option to either make refunds to delinquent accounts in accordance with the terms of this order to credit said accounts for the full amount of any refund due.

VIII

It is further ordered, That respondents, when making cash refunds or when crediting any account with the full amount of any refund due following receipt of the notice set forth in Attachment C of this order, mail or deliver the refund or credit said account within thirty

(30) days of the receipt by respondents of said notice. The above-mentioned credit shall be reflected on the next account status statement to be sent to the obligor following the above-mentioned crediting of his account.

Provided, however, that respondents shall not be required to make refunds or to credit accounts with respect to any cancellation notice, as so set forth in Attachment C of this order, or any cancellation request, received by respondents later than sixty (60) days following the date of said notice's receipt by the obligor or later than sixty (60) days from the date that respondents otherwise notified the obligor of his cancellation prerogatives.

IX

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents involved in consummating consumer credit obligations, and that respondents secure a signed statement acknowledging receipt of said copy of this order from each such person.

X

It is further ordered, That no provision of this order shall apply to an entity which is neither related to nor has any continuity of interest with any respondents named herein, other than being assignee or holder of respondents' consumer credit transactions.

Provided, however, that the provisions of this paragraph shall not be interpreted to excuse any assignee of any liability imposed by Section 115 of the Truth in Lending Act, or to excuse any respondent from complying with any obligation imposed by this order with regard to the consumer credit transactions so assigned.

XI

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

XII

It is further ordered, That each individual respondent named herein promptly notify the Commission of each change in the respondent's business or employment status, which includes discon-

tinuance of the respondent's present business or employment, and each affiliation with a new business or employment, for five (5) years following the effective date of this order. Such notice shall include the address of and a description of the business or employment with which each respondent is newly affiliated as well as a description of each respondent's duties and responsibilities in connection with that business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

XIII

It is further ordered, That respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with this order.

ATTACHMENT A

PERSONAL CREDIT INSURANCE AUTHORIZATION

YOUR APPLICATION FOR CREDIT HAS BEEN APPROVED IN THE AMOUNT OF _____.

CREDIT LIFE OR CREDIT ACCIDENT & HEALTH (DISABILITY) INSURANCE IS NOT REQUIRED IN CONNECTION WITH THIS EXTENSION OF CREDIT TO YOU AND YOUR DECISION WITH REGARD TO THE PERSONAL INSURANCE WILL NOT AFFECT THE TOTAL AMOUNT OF CREDIT WHICH HAS ALREADY BEEN APPROVED FOR YOU.

IF YOU ELECT CREDIT INSURANCE THESE PREMIUMS WILL BE ADDED TO THE AMOUNT OF CREDIT APPROVED FOR YOU.

Credit Life $____ (For term of transaction)

Credit A & H (Disability) $____ (For term of transaction)

I have received a fully completed and executed copy of this form. I have reviewed the amount financed options set forth below and understand that if I choose an amount financed option that includes any of the insurance coverages I am authorizing the creditor to pay the insurance premiums on my behalf. I have voluntarily chosen the following amount financed option:

Option 1	Option 2	Option 3	Option 4
Amount Financed Without Personal Credit Insurance	Amount Financed With Credit Life Only	Amount Financed With Credit A & H (Disability) Only	Amount Financed With Credit Life and A & H (Disability)
$ _____	$ _____	$ _____	$ _____

No. of Months	No. of Months	No. of Months	No. of Months
____	____	____	____
_____	_____	_____	_____
(Borrower)	(Borrower)	(Borrower)	(Borrower)
_____	_____	_____	_____
(Borrower)	(Borrower)		
_____	_____	_____	_____
(Date)	(Date)	(Date)	(Date)

ATTACHMENT B

Name of Creditor
Address of Creditor

Dear Customer:

As part of your current credit transaction with us charges were made for credit life insurance, credit disability insurance, auto medical payment insurance and auto club membership [mention as applicable], in the following amounts:

TYPE OF COVERAGE	AMOUNT CHARGED
Credit Life Insurance	$ _____
Credit Disability Insurance	$ _____
Auto Medical Payments Insurance	$ _____
Auto Club Membership	$ _____

Because many of our customers may not have been fully aware of the voluntary nature of this insurance coverage [and membership] at the time they purchased it, we are offering you the opportunity to cancel your insurance coverage [and membership]. If you decide to cancel your insurance [and/or membership], the company will credit your account with the balance of the premiums or fees due if your account is delinquent. If your account is current we will make a cash refund of the balance due. This amount will be based on a schedule which takes into account the remaining time period on your transaction and the protection which you have already received. If you cancel this insurance, your protection will end as of the date we receive your written notice of cancellation.

If you desire to cancel your insurance coverage [and/or membership], please complete the enclosed form and return it within two weeks in the enclosed envelope which requires no stamp. If you want your insurance [and membership] to remain in force, you need not return the enclosed form or take any other action in connection with this matter.

Sincerely,

ATTACHMENT C

From [Name of Borrower]:

To [Name of Creditor]:

At the time I entered into my credit transaction, I did not understand that credit insurance [and other benefits listed below] were voluntary. Please cancel the benefits

checked below and refund to me the applicable portion of the premium(s) and/or fee(s) shown on this form. I understand that the company reserves the right to credit my account with such refund if my account is in delinquent status.

CHECK COVERAGE TO BE CANCELLED

( ) cancel my credit life insurance [list
( ) cancel my credit disability insurance applicable
( ) cancel my auto medical payments insurance coverages]
( ) cancel my auto club membership

(NOTE: DO NOT SIGN OR RETURN THIS FORM IF YOU WANT YOUR BENEFITS TO REMAIN IN FORCE)

DATE _____ _____
Obligor

IN THE MATTER OF

EXXON CORPORATION, ET AL.

Docket 8934. Interlocutory Order, Nov. 10, 1977

Granting in part and denying in part of motion by complaint counsel for leave to modify pending application for interlocutory review and to obtain expedited decision on modified application.

ORDER GRANTING IN PART AND DENYING IN PART COMPLAINT COUNSEL'S MOTION FOR LEAVE TO MODIFY PENDING APPLICATION FOR INTERLOCUTORY REVIEW AND TO OBTAIN AN EXPEDITED DECISION ON THE MODIFIED APPLICATION

Complaint counsel on February 20, 1976, filed with the Administrative Law Judge a motion for issuance of subpoenas *duces tecum* to respondents. The motion exceeded 1,800 pages and included approximately 700 numbered specifications[1] which, according to complaint counsel, "request[ed] a vast number of documents quite likely numbering in the millions or tens of millions."[2] This was to be complaint counsel's first effort to secure documents of a substantive nature from respondents. In July 1976, respondents filed individual and joint objections to the motion and in September complaint counsel filed a reply which included a revised subpoena request. The reply contained 950 pages, including over 300 pages of specifications, definitions and instructions and 300 pages of analyses thereof. The revised request was hardly the shadow of complaint counsel's former request; it contained approximately 550 numbered specifications.[3]

By his order of November 11, 1976, the ALJ questioned the practicality of complaint counsel's discovery strategy. He noted that complaint counsel had made "what appear to be plausible arguments why the various avenues of investigation would or might produce relevant information or might be fruitful in uncovering leads to relevant information. However, when all of the avenues of investigation are taken together they add up to an overwhelming and unreasonable burden upon respondents and an unmanageable case."[4] Accordingly, he denied a major portion of complaint counsel's motion but authorized the issuance of more limited subpoenas calling for the production of introductory materials concerning

[1] Order Denying Major Portion of, but Granting in Part, Complaint Counsel's Motion for Issuance of Subpoenas Duces Tecum to Respondents and Establishing Guidelines as to any Further such Motions, November 11, 1976, at 5.

[2] Motion by Complaint Counsel for Issuance of Subpoenas Duces Tecum to Respondents, February 20, 1976, at 10.

[3] Order, November 11, 1976, at 8, 20.

[4] *Id.* at 24.

respondents' structure and operations and certain documents filed with other government agencies.[5]

In their motion for reconsideration, complaint counsel again modified their discovery request, agreeing to convert all interrogatories to document requests, to delete specifications that referred to transcript pages[6] and to alter the forward cutoff date for documents to be produced.

As the Judge noted in denying the motion for reconsideration, the specifications "are so burdensome, particularly with respect to the time it would take to comply, that, considering also other future discovery steps proposed to be taken by complaint counsel, the end of discovery could not realistically be envisioned and a trial date could not be realistically predicted, except to predict that it would be far off in the future."[7] The Law Judge, pursuant to Section 3.23(b) of the Rules of Practice, granted complaint counsel's request for permission to file an application for interlocutory review.

In January 1977, complaint counsel filed their application for review and respondents filed their answers. While complaint counsel's voluminous subpoena application was pending review by the Commission, they moved, on September 28, 1977, that the Commission refrain from ruling on the hundreds of individual specifications in order that they might submit to the ALJ a shorter, less burdensome and more manageable subpoena.[8] The motion before us asks essentially that complaint counsel be permitted to withdraw the subpoena. We grant that motion, without prejudice.

Complaint counsel also request that the Commission:

> (1) instruct the ALJ that the burden of complying with Commission subpoenas should be evaluated in light of offers by complaint counsel to screen documents;
>
> (2) instruct the ALJ that he has authority under the rules to require the type of subpoena compliance conditions and controls proposed by complaint counsel;
>
> (3) rule that complaint counsel in their forthcoming revised information request, are entitled to substantial discovery into post-complaint events

[5] The subpoenas issued on November 24, 1976. The Commission declined respondents' request that it review the subpoenas on an interlocutory basis. Order Denying Request for Interlocutory Review, March 8, 1977 [89 F.T.C. 168]. On July 26, 1977, the Commission commenced a proceeding to enforce the subpoenas against five respondents that declined to produce certain documents and one that declined to produce any. *FTC* v. *Anderson*, Misc. No. 77-0161 (D.D.C.).

[6] Many specifications requested all documents referred to by a particular witness during the course of depositions and interviews. The ALJ ruled that "respondents would be required to comb almost 13,000 pages of depositions and interviews. . . to find some 3,315 pages or portions of pages which purport to describe required documents. . . ." Order, November 11, 1976, at 46.

[7] Order Denying Complaint Counsel's Motion for Reconsideration. . ., December 22, 1976, at 10.

[8] Seemingly conceding the wisdom of the ALJ's November 11 order, complaint counsel assert that "[t]he returns on the nonsubstantive November 24 subpoenas duces tecum have afforded us for the first time an opportunity to make reasonably informed reductions in our substantive document discovery requests." Complaint Counsel's Motion for Leave to Modify Pending Application . . ., September 28, 1977, at 6.

including the current activities of respondents reflected in respondents' active or working files; and

(4) direct the law judge to adopt an expedited time-table for the filing of respondents' opposition, if any, to complaint counsel's forthcoming revised document subpoena proposal and for prompt commencement of respondents' compliance with, or early announcement of any intended noncompliance with, the resulting subpoenas issued by the ALJ.

We reject the argument advanced by several respondents that the requests have been mooted by complaint counsel's withdrawal of their subpoena specifications. The issues presented by these requests are almost certain to be raised by any new specifications. All but one of the respondents also assert that these issues are not now properly before the Commission and that the ALJ must be afforded an opportunity to decide them in the context of the revised specifications. In view of their importance, however, we believe it appropriate to provide the parties and the ALJ some guidance as to our thinking on the issues raised by the first two requests. Since we will not be considering the propriety of specific discovery provisions, these issues can be addressed without reference to the forthcoming subpoena application.[9]

The first two requests concern the ALJ's authority to provide for discovery methods not explicitly sanctioned by the Rules of Practice.[10] In *Century 21 Commodore Plaza, Inc.*, CCH Trade Reg. Rep. para. 21,276, at 21,177 (89 F.T.C. 108, 1977), the Commission held that access orders are authorized by the F.T.C. Act and that the Administrative Law Judges may issue such orders under Rule 3.42(c). We believe that the law judges are likewise authorized to impose production procedures designed to assure orderly compliance with subpoenas. *Cf. Ash Grove Cement Co.*, 77 F.T.C. 1660 (1970).[11]

We do not mean to suggest, however, that the Administrative Law

[9] Except perhaps for the fourth issue, we believe that these issues are fairly within the scope of the ALJ's December 22, 1976, certification under Rule 3.23(b).

[10] The ALJ, in assessing the burden of complaint counsel's requested discovery, refused to consider an alternative order advanced in their reply on the grounds that it amounted to an order directing access to respondents' files and that such orders are not authorized by our Rules of Practice. We are inclined to agree with the ALJ's characterization of this proposal although not with his conclusion that such orders are not authorized by the Rules of Practice.

[11] In support of his holding that he lacked authority to impose the production controls suggested in a second alternative order proposed by complaint counsel, the ALJ cited language in a footnote to Rule 3.34(b)(2) and also in a notice of proposed amendments to the Commission's discovery rules, 40 F.R. 15239 (1975), stating that the Rules of Practice do not provide for requests, or orders, for production of documents as an alternative method of discovery. Order, November 11, 1976, at 40.

We do not believe that these statements are inconsistent with the issuance of an order imposing controls essential to orderly compliance with a subpoena. The Commission in 1967 rescinded a rule authorizing production orders because proper use of the newly adopted rules authorizing subpoenas *duces tecum* to parties during pre-trial discovery "ma[de] the use of such orders superfluous." *All-State Industries of North Carolina, Inc.*, 72 F.T.C. 1020, 1023 (1967). Until 1967, the production order was, in effect, the pre-trial equivalent of the subpoena *duces tecum*. Although "orders for the production of documents" are no longer to be employed in view of the availability of subpoenas, we do not believe that the imposition of necessary compliance controls is precluded.

Judges are free to allow discovery by any method they deem expedient. Discovery should ordinarily be by the methods described in the Rules of Practice. Only where necessary to the conduct of "fair and impartial hearings. . .[and] to avoid delay in the disposition of proceedings," Rule 3.42(c), may the law judges resort to discovery methods not explicitly sanctioned by the Rules. Moreover, the Administrative Law Judges may not depart from the specific requirements of applicable rules and any orders they issue must, of course, be authorized by the F.T.C. Act.[12]

We see no reason to address complaint counsel's third request. The ALJ has already ruled that complaint counsel are entitled to discovery of post-complaint materials. Determination of appropriate forward cutoff dates should be left to the Law Judge's discretion based on his review of the revised specifications.

Nor have complaint counsel offered sufficient justification for their fourth request. While we hope that the revised specifications can be decided expeditiously, there has been no showing of the ALJ's unwillingness to adopt an appropriate timetable for disposition of complaint counsel's forthcoming subpoena proposal. Moreover, since complaint counsel's proposal is not before us, and, indeed, has apparently not been completed, we have no basis for determining what would be an appropriate timetable for a decision by the ALJ on the revised specifications or for compliance with any specifications he upholds.[13]

We are unwilling to assume that cases involving complex issues and large industries are incapable of efficient adjudication. We believe that complaint counsel's determination to submit a "more manageable subpoena"[14] is a step in the right direction. This, together with the use of discovery procedures tailored to the needs of complex litigation[15] and close adherence to the suggestions set forth in the Manual for Complex Litigation, including continued efforts by the Law Judge to maintain firm control of the proceeding,[16] will

[12] Assuming that, in the circumstances of this case, an access order would be appropriate, the ALJ's assessment of the burden of complaint counsel's request obviously should take into account any reduced burdens resulting from their screening of respondents' files. *Cf. Hunt Foods and Industries, Inc.* v. *FTC*, 286 F.2d 803, 810-12 (9th Cir. 1960), *cert. denied*, 365 U.S. 877 (1961). We do not decide whether access orders or compliance controls should be imposed in this case, much less the question of the sorts of provisions that would be appropriate.

[13] Complaint counsel have also suggested that the Commission "authorize complaint counsel to undertake phased document and data discovery commencing with an initial, vastly reduced subpoena duces tecum as outlined" in their motion. Motion at 9. Complaint counsel do not need Commission authorization to file a revised request with the ALJ and we do not understand complaint counsel to request us to endorse a subpoena we have not seen.

[14] Motion at 6.

[15] Pp. 4-5 *supra*.

[16] *See Manual*, §1.10 (CCH 1973). The ALJ's efforts to control this case have been frustrated by the parties' numerous appeals to the Commission. We have entertained this appeal solely to indicate our belief that the Rules of Practice afford the trial judge broad power to manage this complicated case forcefully and efficiently. This order

(Continued)

enable this case to be adjudicated in the foreseeable future.[17]

It is so ordered.

should not be understood to signal an inclination to review rulings that are best left to the responsible judgment of the ALJ. *See, e.g., Exxon Corp.*, 85 F.T.C. 404 (1975).

[17] The Commission denies the request of Texaco Inc. that we suspend the pending subpoena enforcement proceeding. Assuming that they are now properly before us, we also reject suggestions made by various respondents that we withdraw the case from adjudication or otherwise terminate it.

IN THE MATTER OF

BRISTOL-MYERS COMPANY, ET AL. - D. 8917

AMERICAN HOME PRODUCTS CORPORATION, ET AL. - D. 8918

STERLING DRUG INC., ET AL. - D. 8919

Dockets 8917, 8918, 8919. Interlocutory Order, Nov. 11, 1977

Order remanding to the administrative law judge an order by him denying *in camera* treatment of certain documents with instructions to grant *in camera* status only to those documents meeting the criteria set forth in the accompanying Commission opinion.

General Foods Corporation applies for review of the administrative law judge's June 28, 1977 order denying its motion for *in camera* treatment of certain documents. The law judge has determined that interlocutory review would be appropriate under Commission Rule Section 3.23(b). We entertain this appeal to clarify the standards as to when *in camera* treatment is warranted.

The Commission's Rules, Section 3.45(b), provide that *in camera* treatment should be granted only in those unusual and exceptional circumstances when good cause is found on the record. It is well established that the person or corporation whose records are involved can satisfy this burden only by demonstrating that public disclosure of the documents will result in "clearly defined, serious injury." *H. P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961).

In this case, General Foods Corporation contends that it will sustain serious injury because disclosure of these documents will provide competitors with the benefits of its research concerning consumer attitudes toward caffeine. In our opinion, however, documents should not be sealed simply because an applicant asserts that its competitors would like to possess the information the documents contain. General Foods Corporation did not provide answers to such fundamental questions as what in rough terms these studies cost, or whether their competitors could replicate them today and at what cost. More importantly, it did not demonstrate that these studies are significant today. Therefore, we conclude that General Foods has not yet demonstrated on the record that public disclosure of these documents will result in serious injury.[1]

We are impressed with the possibility, however, that the docu-

[1] Nor is it relevant that General Foods Corporation relied on complaint counsel's promise to support General Foods Corporation's motion to limit access to respondent's counsel. That promise pertained only to those portions of the documents not introduced into evidence, but given to respondent's counsel for purposes of cross-examination. As the law judge points out there has been no agreement by complaint counsel not to offer these documents as a

(Continued)

ments in question may warrant *in camera* treatment. General Foods Corporation does state that the efforts of several of its employees and outside consultants, and significant marketing outlays, were involved in producing this research. It also maintains that this research is relevant to marketing non-caffeine coffee today and that its competitors would also find it useful. It has raised doubt in our mind as to the possibility that it will incur serious injury. For this reason, we remand this matter for further consideration, with the following guidance as to what constitutes "good cause" in terms of Section 3.45(b).

We do not believe that everything that is loosely called a trade secret in the world of commerce necessarily meets the standard that disclosure will result in serious injury.[2] We cannot accept the logic of General Foods Corporation's argument that its research falls under the "trade secrets" rubric and therefore, should be accorded *in camera* treatment regardless of any discussion of the seriousness of the injury. On the contrary, to warrant *in camera* treatment it must be shown that public disclosure of research, as in this case, or of any allegedly confidential business information will result in clearly defined serious injury. This standard reflects the balance the Commission has struck between the need for a public record and the danger of discouraging business from producing and retaining socially valuable information. The "serious injury" standard is appropriate because the latter danger can only arise when the documents in question are secret and material to the applicant's business, and would less likely be produced if it were known that they had to be publicly disclosed. In all other circumstances, disclosure will not cause serious injury and secrecy would have to give way to the strong Commission policy favoring a public record.

Accordingly, we believe demonstrating serious injury requires the applicant to show that the documents are secret, that they are material to the applicant's business and that public disclosure will plausibly discourage the future production of such information. We find the Restatement of Torts to be instructive regarding the first two criteria. The following factors should be weighed in considering both secrecy and materiality:

> (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and

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part of the public record. Moreover, the public policy behind an open record is no less important, where complaint counsel does not oppose *in camera* treatment. *See, National Dairy Products Corporation*, 64 F.T.C. 1441, 1442 (1964); and *Crown Cork & Seal Company, Inc.*, 71 F.T.C. 1714, 1716 (1967).

[2] We need not consider "trade secrets" as defined by 15 U.S.C. 46(f) because that exception to §46(f) is inapplicable to adjudicative proceedings. *See Hood* at 1188-89.

> others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. Restatement of Torts §757, Comment b at 6 (1939).

We would add that when considering (4), the value of the information, the law judge should place a greater burden on the applicant when the information is old. Regarding the final criterion, the law judge should consider whether the production of the information is required by law or whether the information would otherwise have been produced and retained regardless of whether it was to be publicly disclosed. Also, we note that wherever it would not defeat the purpose of the application, the applicant should demonstrate good cause using the most specific information available.

In ruling on requests for *in camera* treatment the law judge should also consider the strength of the policies favoring disclosure in the particular factual context. Thus, the general and fundamental policy favoring government decisions based on publicly available facts may warrant different treatment for similar information depending upon the importance of the information to an understanding of the Commission's decisionmaking processes. Taking this approach, it may be reasonable in some cases, as Commission Rule 3.45(a) allows, for the law judge to grant *in camera* treatment for information at the time it is offered into evidence subject to a later determination by the law judge or the Commission that public disclosure is required in the interests of facilitating public understanding of their subsequent decisions.

We note, to avoid confusion, that this appeal does not present questions regarding the terms or the advisability of any *in camera* order that might issue. *Compare Mississippi River Fuel Corporation,* 69 F.T.C. 1186 (1966); *F.T.C.* v. *Crowther,* 430 F. 2d 510 (D.C. Cir. 1970); *Ash Grove Cement Co.,* 77 F.T.C. 1671 (1970); *Eaton Yale & Towne, Inc.,* 79 F.T.C. 998 (1971); and *Pepsico, Inc.,* 83 F.T.C. 538 (1973).

Finally, consideration of the above factors, like other questions relating to the proper, fair and expeditious conduct of adjudicative hearings is a matter within the sound discretion of the administrative law judge.

Because the administrative law judge did not consider and could not have anticipated many of these issues, this matter should be and

it will be remanded to the law judge for reconsideration of his order denying *in camera* treatment. In so disposing of the appeal, we intimate no view on whether said documents should in fact be afforded *in camera* treatment.

ORDER REMANDING CASE

This matter having been heard and considered by the Commission upon the interlocutory appeal filed by General Foods Corporation from an order of the administrative law judge denying *in camera* treatment, and the Commission for reasons stated in the accompanying opinion having determined that General Foods Corporation failed to demonstrate good cause for *in camera* treatment.

It is ordered, That this proceeding be, and it hereby is, remanded to the law judge with instructions that he grant *in camera* status only to those documents which upon reconsideration, after the parties have been afforded an opportunity to present their views thereon, appear to warrant *in camera* protection in accordance with the Commission's views as expressed in the accompanying opinion.

IN THE MATTER OF

THE KROGER COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 9040. Complaint, June 24, 1975 — Decision, Nov. 11, 1977

This consent order, among other things, requires a Cincinnati, Ohio retail food store chain to make each of its advertised items readily available for sale to customers in its stores, to have advertised items correctly priced, and to sell those items at or below the advertised price. Further, the firm must post copies of advertisements and notices of the availability of "rainchecks" for unavailable items.

Appearances

For the Commission: *Robert Eliot Easton, Charles L. Hall* and *James J. Angelone.*

For the respondent: *Murray H. Bring, Robert Pitofsky, Peter K. Bleakly, Thomas D. Nurmi* and *M. Jean Anderson, Arnold & Porter,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that The Kroger Company, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereto would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

COUNT I

(Alleging violation of Section Five of the Federal Trade Commission Act)

PARAGRAPH 1. Respondent, The Kroger Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio with its office and principal place of business located at 1014 Vine St., Cincinnati, Ohio.

PAR. 2. Respondent through its wholly-owned subsidiaries is engaged in the operation of a chain of retail food stores, operating approximately 1,258 stores in 20 states. Its volume of business is substantial, totaling approximately 3.8 billion dollars in retail food

sales in 1973. In the operation of its retail food stores, respondent offers and sells to its customers an extensive line of products, including food, drugs, cosmetics, and devices as those terms are defined in the Federal Trade Commission Act, all of which are sometimes referred to hereinafter as "items." Some of said items are manufactured or processed by respondent at its manufacturing and processing plants located in various states. However, many of said items are purchased from numerous independent suppliers located throughout the United States.

PAR. 3. In the course and conduct of its business, as aforesaid, respondent now causes, and for some time last past has caused, directly or indirectly, the aforesaid items to be shipped and distributed from its manufacturing and processing plants or from its other sources of supply to its warehouses, distribution centers, or retail food stores located in various states other than the state of origination, distribution or storage of said items. In the further course and conduct of its business, respondent transmits contracts, business correspondence, monies and other documents from its stores, offices, and divisions located in states other than the states in which such contracts, correspondence, monies, and other documents originated. Respondent maintains, and at all times mentioned herein has maintained a substantial course of trade in the distribution, advertising, offering for sale and sale of the aforesaid items in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business, as aforesaid, and for some time last past respondent has been and is now disseminating, and causing the dissemination of, certain advertisements concerning the aforesaid items by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to, advertisements in newspapers of general and interstate circulation and other advertising media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said items from respondent; and respondent has been and is now disseminating, and causing the dissemination of, advertisements concerning said items by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the attempted or actual purchase from respondent of the said items in commerce, as "commerce" is defined in the Federal Trade Commission Act. Many of the said advertisements list or depict the aforesaid items and also contain statements and representations concerning the price or terms at which said items would be

offered for sale. Many of the aforesaid advertisements contain further direct and express statements and representations concerning the time periods during which the offers would be in effect and the locations of respondent's food stores at which the offers would be made.

PAR. 5. Through the use of such advertisements disseminated in various areas of the United States served by respondent's retail food stores, respondent has represented directly or by implication that in those stores covered by such advertisements, throughout the effective periods of the advertised offers, the items listed or depicted in such advertisements would be:

A. Readily available for sale to customers;

B. Readily and conspicuously available for sale at or below the advertised prices; and

C. Sold to persons who attempted to purchase such items at prices at or below the advertised prices.

PAR. 6. In truth and in fact, in a significant number of respondent's retail food stores covered by such advertisements, during the effective periods of the advertised offers, a substantial number of the items listed or depicted in the said advertisements were:

A. Not readily available for sale;

B. Not readily and conspicuously available for sale at or below the advertised prices; or

C. Sold to persons who attempted to purchase such items at prices higher than the advertised prices.

Therefore, the statements and representations as referred to herein, were false, misleading and deceptive, and each of such advertisements was misleading in material respects and constituted a "false advertisement," as that term is defined in the Federal Trade Commission Act.

PAR. 7. By disseminating or causing the dissemination of advertisements which offer or present for sale items as aforesaid, and by failing to have, in a significant number of its stores covered by such advertisements, during the effective periods of the advertised offers, substantially all of the aforesaid advertised items:

A. Readily available for sale to customers in quantities sufficient to meet reasonably anticipated demands;

B. Conspicuously available for sale at or below the advertised prices;

and by selling substantial numbers of said items to persons attempting to purchase such items at prices in excess of the

advertised price, respondent has engaged in unfair acts and practices.

PAR. 8. In the course and conduct of its business, and at all times referred to herein, respondent has been and now is in substantial competition in commerce, with corporations, partnerships, firms and individuals in the retail food and grocery business.

PAR. 9. The use by respondent of the aforesaid unfair and false, misleading and deceptive statements, representations, acts and practices, including the dissemination of the aforesaid "false advertisements," has had the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the said statements and representations were true, and to induce such persons to go to respondent's stores and to purchase from respondent substantial quantities of the advertised items at prices in excess of the advertised prices and substantial quantities of items other than the advertised items, some of those other items being higher priced or otherwise less desirable to Kroger customers than the unavailable advertised items, by reason of such erroneous and mistaken belief.

PAR. 10. The acts and practices as aforesaid, and the dissemination by respondent of the false advertisements, as aforesaid, were all to the prejudice and injury of the public and of respondent's competitors and constituted unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

(Alleging violations of the Federal Trade Commission Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices (16 C.F.R. 424), and Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One, Two, Three, Four, and Eight, respectively, of Count I hereof are incorporated by reference in Count II as if fully set forth verbatim)

PAR. 11. The Federal Trade Commission, pursuant to the Federal Trade Commission Act, as amended, 15 U.S.C. 41, *et seq.*, and the provisions of Subpart B, Part 1, of the Commission's Procedures and Rules of Practice, 16 C.F.R. 1.11, et seq., conducted a proceeding for the promulgation of a trade regulation rule regarding retail food store advertising and marketing practices. Notice of this proceeding, including a proposed rule, was published in the *Federal Register* on November 14, 1969 (34 F.R. 18252). Interested parties were thereaf-

ter afforded opportunity to participate in the proceeding through the submission of written data, views, and arguments, and to appear and orally express their views as to the proposed rule and to suggest amendments, revisions, and additions thereto.

The Commission considered all relevant matters of fact, law, policy, and discretion, including the data, views, and arguments presented on the record by interested parties in response to the Notice as indicated in the accompanying Statement of Basis and Purpose (36 F.R. 8777 (May 13, 1971)) and as prescribed by law, determined that the adoption of the trade regulation rule was in the public interest, and, accordingly, promulgated the Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices on May 13, 1971, effective July 12, 1971.

PAR. 12. Respondent is a member of the retail food store industry, and its acts and practices in connection with the sale and offering for sale of food and grocery products or other merchandise being subject to the jurisdiction of Section 5 of the Federal Trade Commission Act are within the intent and meaning of, and are subject to, the provisions of the aforesaid Trade Regulation Rule.

PAR. 13. In connection with its aforesaid advertisements, respondent, in a substantial number of instances, has failed to comply with Paragraph (1) of the aforesaid Trade Regulation Rule by offering food and grocery products or other merchandise subject to the jurisdictional requirements of Section 5 of the Federal Trade Commission Act for sale at stated prices by means of advertisements disseminated in areas served by certain of its stores which were covered by such advertisements but which during the advertised sale period neither had such products in stock readily available for sale to customers nor provided clear and adequate notice that the items were in stock and might be obtained upon request.

PAR. 14. In connection with its advertisements disseminated as aforesaid, respondent, in a substantial number of instances, has failed to comply with Paragraph (2) of the aforesaid Trade Regulation Rule by offering food and grocery products or other merchandise subject to the jurisdictional requirements of Section 5 of the Federal Trade Commission Act for sale at stated prices by means of advertisements disseminated in areas served by certain of its stores which were covered by such advertisements and by failing in those stores to make certain of the advertised items conspicuously and readily available for sale at or below the advertised prices during the effective periods of the advertisements, and by failing to charge out to persons who attempted to purchase such items substantial numbers of such advertised products at prices at or below

the advertised prices during the effective periods of the advertisements.

PAR. 15. Respondent's aforesaid violations of the Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices constitute unfair and deceptive acts and practices in violation of Section 5 of the Federal Trade Commission Act.

Commissioners Thompson and Nye dissenting.

DECISION AND ORDER

The Federal Trade Commission having issued a complaint based upon alleged acts and practices of The Kroger Co., a corporation, also trading and doing business as Kroger, hereinafter referred to as respondent, and having served such complaint upon respondent and having withdrawn the proceeding from adjudication based upon a joint motion for withdrawal from adjudication filed by complaint counsel and counsel for respondent; and

The respondent and counsel for the Commission having executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law had been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed pursuant to Sections 2.34 and 3.25 of its Rules, now in further conformity with the procedure prescribed in Section 3.25 of its Rules, the Commission hereby makes the following jurisdictional findings, and enters the following order:

1. Respondent The Kroger Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 1014 Vine St., Cincinnati, Ohio. Respondent also operates, trades and does business under the name Kroger.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

Definitions: For purposes of this order, "unadjusted rate of

unavailability" means the raw rate of unavailability before the rate is reduced by those instances of unavailability which are excused by defenses set forth in Trade Regulation Rule 424, as presently drafted, or this order.

For purposes of this order, "unadjusted rate of over price marking or overcharging" means the raw rate of over price marking or overcharging before the rate is reduced by those instances of over price marking or overcharging which are excused by defenses set forth in Trade Regulation Rule 424, as presently drafted, or this order.

For purposes of this order, "sample" means a selection of at least forty of respondent's stores, at least 50 percent of which will be selected from at least four of the twenty largest standard metropolitan statistical areas in which respondent operates six or more retail food stores. The survey of the sample must be conducted in at least three different weeks, and not more than 40 percent of the stores selected may be surveyed during the same week. Stores to be surveyed by or on behalf of the Commission shall be chosen in a manner which is consistent with this definition but which is otherwise to be determined at the discretion of the staff or the Commission. Respondent waives any right it might have to challenge the admissibility into evidence of the results of the survey of the sample on grounds that those results are not projectable to a universe greater than the sample. Respondent, however, retains the right to challenge the evidentiary weight to be given to the results of any such survey on any legally available basis.

For purposes of this order, the "average, unadjusted rate of unavailability revealed by a survey of a sample of respondent's retail food stores" referred to in Section II.B.1. of this order shall be determined as follows:

a. For each store surveyed, the number of items which the ad represents to be available in that store and the number of items found to be unavailable in that store shall be recorded.

b. After the individual stores in the sample are surveyed, the total number of items represented to be available in the surveyed stores shall be determined.

c. After the individual stores in the sample are surveyed, the total number of items found to be unavailable in the surveyed stores shall be determined.

d. A fraction shall then be constructed using as the numerator the total number of items found to be unavailable (see subparagraph c) and as the denominator the total number of items contained in all relevant advertisements (see subparagraph b).

e. The fraction described in subparagraph d shall then be multiplied by 100 to arrive at a percentage figure.

Total # items found to be unavailable/ Total # items contained in advertisements times 100 equals Average, unadjusted rate of unavailability

For purposes of this order, the "average, unadjusted rate of . . . over price marking . . . revealed by a survey of a sample of respondent's retail food stores" referred to in Section II.D.1. of this order shall be determined as follows:

a. For each store surveyed, the number of items which the ad represents to be available in that store and the number of items found to be over price marked in that store shall be recorded.

b. After the individual stores in the sample are surveyed, the total number of items represented to be available in the surveyed stores shall be determined.

c. After the individual stores in the sample are surveyed, the total number of items found to be over price marked in the surveyed stores shall be determined.

d. A fraction shall then be constructed using as the numerator the total number of items found to be over price marked (see subparagraph c) and as the denominator the total number of items contained in all relevant advertisements (see subparagraph b).

e. The fraction described in subparagraph d shall then be multiplied by 100 to arrive at a percentage figure.

Total # items found to be over price marked/ Total # items contained in advertisements times 100 equals Average, unadjusted rate of over price marking

For purposes of this order, the "average, unadjusted rate of . . . overcharging . . . revealed by a survey of a sample of respondent's retail food stores" referred to in Section II.D.1. of this order shall be determined as follows:

a. For each store surveyed, the number of items which the ad represents to be available in that store and the number of items found to be overcharged in that store shall be recorded.

b. After the individual stores in the sample are surveyed, the total number of items represented to be available in the surveyed stores shall be determined.

c. After the individual stores in the sample are surveyed, the total number of items found to be overcharged in the surveyed stores shall be determined.

d. A fraction shall then be constructed using as the numerator the total number of items found to be overcharged (see subparagraph

c) and as the denominator the total number of items contained in all relevant advertisements (see subparagraph b).

e. The fraction described in subparagraph d shall then be multiplied by 100 to arrive at a percentage figure.

Total # items found to be overcharged/ Total # items contained in advertisements times 100 equals Average unadjusted rate of overcharging

For purposes of this order, "respondent" means The Kroger Co., a corporation, its successors or assigns, its officers, agents, representatives and employees.

For purposes of this order, "retail food store" shall mean all of respondent's food stores, but shall not include convenience stores (stores less than 4,000 square feet in total area) and drug stores.

I. *Prohibited Activities.*

It is ordered, That respondent, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of food or grocery products or other merchandise, hereafter sometimes referred to as items, offered or sold in its retail food stores, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from, directly or indirectly:

A. Disseminating, or causing the dissemination of any advertisement by any means which offers or presents any items for sale at a stated price, unless throughout the effective period of the advertised offer at each retail food store covered by the advertisement:

1. Each advertised item is readily available for sale to customers in the public area of the store, or, if not readily available there, a clear and conspicuous notice is posted where the item is regularly displayed which states that the item is in stock and may be readily obtained upon request, and said item is readily furnished upon request;

2. Each unit of each advertised item, any of which is marked with a price, is individually, clearly, and conspicuously marked with a price no higher than the advertised price; and

3. Each unit of each advertised item is sold to customers at or below the advertised price.

Unless, with respect to 1, 2 and 3 above, respondent was complying with a specific exception, limitation or restriction with respect to store, item or price which was clearly and conspicuously disclosed in all advertisements for the product in question.

Provided, however, that no enforcement proceeding relating to the unavailability, over price marking or overcharging of advertised products, which is based on a survey, shall be instituted or

commenced except on the basis of a survey conducted by, on behalf of, or under the guidance or direction of the Commission of a sample of respondent's retail food stores.

II. A. *Defenses Applicable to Unavailability.*

The following shall constitute defenses to a charge of unavailability under Trade Regulation Rule 424, as presently drafted, Section 5 of the Federal Trade Commission Act or any provision of this order if respondent can show:

1. That the advertised items were unavailable due to circumstances beyond respondent's control, that respondent did not have notice or knowledge of such impending unavailability in time to delete the items from the proposed advertisement, and that respondent offered to customers a "raincheck" for each unavailable item which entitled the holder to purchase the item in the near future at or below the advertised price; or

2. That the advertised items were delivered to respondent's retail food stores in quantities sufficient to meet reasonably anticipated demand.

B. *Presumptions Applicable to Defenses Set Forth in Section II.A.*

The following presumptions apply to the defenses set forth in Section II.A.

1. Because respondent, pursuant to Section III.C.2. of this order, has obligated itself to institute, enforce, and maintain procedures designed to effect compliance with this order, if (a) the average, unadjusted rate of unavailability revealed by a survey of a sample of respondent's retail food stores does not exceed four (4.0) percent, and (b) the unavailability revealed by the survey is not shown to be caused in whole or substantial part by the gross negligence or deliberate acts or omissions of respondent, it shall be presumed that such unavailability resulted from circumstances beyond respondent's control within the meaning of Section II.A.1. *Provided, that,* sporadic unavailability caused by the gross negligence or deliberate acts or omissions of a store level employee of respondent shall not negate the presumption if respondent can demonstrate that it took appropriate disciplinary action against the employee promptly after learning that the employee's gross negligence or deliberate acts or omissions caused such unavailability. *Provided further,* that persistent unavailability caused by the gross negligence or deliberate acts or omissions of a substantial number of store level employees of

respondent shall be attributed to respondent and shall negate the presumption.

2. If respondent is not advised in writing by the Federal Trade Commission or its staff that it has reason to believe that respondent has failed to make advertised items available, in violation of Trade Regulation Rule 424, Section 5 of the Federal Trade Commission Act or this order, and is not so notified within three months of the occurrence of such alleged violation, it shall be presumed that the alleged failure of respondent to make advertised items available was due to circumstances beyond respondent's control within the meaning of Section II.A.1. Such notice shall indicate each specific item alleged to be unavailable in identified stores on specified days.

C. *Defenses Applicable to Over Price Marking or Overcharging.*

The following shall constitute defenses to a charge of over price marking or overcharging under Trade Regulation Rule 424, as presently drafted, Section 5 of the Federal Trade Commission Act or any provision of this order if respondent can show:

1. That the advertised items were not marked or charged out at or below the advertised price due to circumstances beyond respondent's control, and respondent, upon notice or knowledge of such over price marking or overcharging, acted immediately to price mark the goods with or charge out the goods at the advertised price;

2. That, with respect to charges of over price marking, in the case of stores equipped with devices which "read" an identification code marked on the packaging of items, and which transmit the information to a computer which then transmits the correct prices of the items to cash registers where the prices are displayed and printed on cash register tapes, where the items (and individual units thereof) are not price marked in any additional manner, the advertised price of such items is clearly and conspicuously posted at the point of display;

3. That in the case of advertised items the ultimate price of which is to be determined by the total dollar amount of the customer's order or the use of a coupon or other similar price arrangement, the price at which the item is sold, and not the price marked on the item, shall govern.

D. *Presumptions Applicable To Defenses Set Forth in Section II.C.*

1. Because respondent, pursuant to Section III.C.2. of this order,

has obligated itself to institute, enforce, and maintain procedures designed to effect compliance with this order, if (a) the average, unadjusted rate of neither over price marking nor overcharging revealed by a survey of a sample of respondent's retail food stores exceeds two (2.0) percent, and (b) the over price marking or overcharging revealed by the survey is not shown to be caused in whole or substantial part by the gross negligence or deliberate acts or omissions of respondent, it shall be presumed that such over price marking or overcharging resulted from circumstances beyond respondent's control within the meaning of Section II.C.1. *Provided, that,* sporadic over price marking or overcharging caused by the gross negligence or deliberate acts or omissions of a store level employee of respondent shall not negate the presumption if respondent can demonstrate that it took appropriate disciplinary action against the employee promptly after learning that the employee's gross negligence or deliberate acts or omissions caused such over price marking or overcharging. *Provided further,* that persistent over price marking or overcharging caused by the gross negligence or deliberate acts or omissions of a substantial number of store level employees of respondent shall be attributed to respondent and shall negate the presumption.

2. If respondent is not advised in writing by the Federal Trade Commission or its staff that it has reason to believe that respondent has failed to price mark or charge out advertised items at the advertised prices in violation of Trade Regulation Rule 424, Section 5 of the Federal Trade Commission Act or this order, and is not so notified within three months of the occurrence of such alleged violation, it shall be presumed that the alleged failure of respondent to make advertised items available at or below the advertised price was due to circumstances beyond respondent's control within the meaning of Section II.C.1. Such notice shall indicate each specific item alleged to be over price marked or overcharged in identified stores on specified days.

III. *Additional Obligations of Respondent.*

A. *It is further ordered,* That throughout each advertised sale period in each of its retail food stores covered by an advertisement, respondent shall post conspicuously (1) at or near each doorway affording entrance to the public, and (2) at or near the place where customers pay for merchandise:

(1) A copy of the advertisement.

(2) The following statement:

All items advertised are required to be readily available for sale at or below the advertised price in each Kroger store except as specifically noted in this ad.

If an advertised item you wish to purchase is unavailable you may obtain a rain check that will enable you to purchase this item at the advertised price in the near future.

If you have any questions, the store manager will be glad to assist you.

B. *It is further ordered,* That respondent shall cause the following statement to be clearly and conspicuously set forth in each printed advertisement which represents that items are available for sale at any of its retail food stores:

Each of these advertised items is required to be readily available for sale in each Kroger store, except as specifically noted in this ad.

C. *It is further ordered,* That:

1. Respondent shall forthwith deliver a copy of this order to each of its operating divisions and to each of its present and future officers and other personnel in its organization down to the level of and including assistant store managers who, directly or indirectly, have any supervisory responsibilities relating to (a) availability or price marking of advertised items in respondent's retail food stores, and (b) check stand operations, or who are engaged in any aspect of preparation, creation, or placing of advertising, and respondent shall secure a signed statement acknowledging receipt of said order from each such person.

2. Respondent shall institute, enforce and maintain a program (including a continuing surveillance program) which is designed to effect compliance with this order and which is adequate to reveal whether the business practices of its retail food stores conform to this order, and shall confer with any duly authorized representative of the Commission pertaining to such program when requested to do so by a duly authorized representative of the Commission. The details (including methodology and procedures to ascertain and effect compliance) of the program are set forth in an initial report on compliance procedures submitted simultaneously with this order. The program may be modified by respondent from time to time, upon thirty (30) days' advance notice to the Commission, *provided,* that as modified the program shall be adequate to comply with respondent's obligations under Part III.C.2. of this order.

3. Respondent shall, for a period of three (3) years subsequent to the date of this order:

a. Maintain business records which show the efforts taken to ensure continuing compliance with the terms and provisions of this order;

b. Grant any duly authorized representative of the Federal Trade Commission access to all such business records;

c. Furnish to the Federal Trade Commission: (i) copies of such records as reveal the results of outside surveys and such other records as are maintained at the Kroger general office, which are requested by any of its duly authorized representatives within three weeks from the date the request is received by respondent; and (ii) copies of all other such records which are requested by any of its duly authorized representatives as promptly as possible.

4. Respondent shall, all other provisions of this order notwithstanding, annually for a period of three (3) years from the date that this order becomes final, file with the Commission a report in writing demonstrating the effectiveness of the steps or actions taken by respondent with regard to the aforesaid program, including a surveillance program, and setting forth in detail the manner and form in which it has complied with this order in the preceding year.

D. *It is further ordered,* That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the respondent which may affect compliance obligations arising out of this order.

E. *It is further ordered,* That the respondent herein shall within 60 days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

FISHER FOODS, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 9062. Complaint, Oct. 28, 1975 — Decision, Nov. 11, 1977

This consent order, among other things, requires a Bedford Heights, Ohio, retail food store chain, to make each of its advertised items readily available for sale to customers in its stores, to have advertised items correctly priced and to sell those items at or below the advertised price. Further, the firm must post copies of advertisements and notices of the availability of "rainchecks" for unavailable items.

Appearances

For the Commission: *Aaron H. Bulloff, Melvin H. Wolovits* and *Paul K. Trause.*

For the respondent: *John F. McClatchey, Thompson, Hine & Flory,* Cleveland, Ohio.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by that Act, the Federal Trade Commission, having reason to believe that Fisher Foods, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

COUNT I

Alleging violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45)

PARAGRAPH 1. Respondent Fisher Foods, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 5300 Richmond Road, Bedford Heights, Ohio.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the operation of a chain of retail food stores. Respondent operates food stores and food departments in Ohio, Kentucky, Northern Illinois, and California. Its volume of business has been and is substantial. In the operation of its retail food stores,

respondent offers and promotes for sale to its customers an extensive line of products, including "food," as that term is defined in the Federal Trade Commission Act, groceries, or other merchandise. Many of the said products offered for sale and sold are manufactured or processed by respondent through its various divisions, subsidiaries, and affiliates at manufacturing and processing plants located in the State of Ohio. Many other of the said products are purchased from numerous suppliers located throughout the United States.

PAR. 3. In the course and conduct of its business as aforesaid, respondent now causes, and for some time last past has caused, directly or indirectly, the aforesaid food and grocery products or other merchandise to be shipped and distributed from the aforesaid manufacturing and processing plants, or from its other sources of supply, to warehouses and distribution centers, and thereafter to its retail food stores located in various states other than the state of origination, distribution, or storage of said products. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in the production, processing, distribution, advertising, offering for sale, and sale of the aforesaid food and grocery products or other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business as aforesaid, and for some time last past, respondent has been, and is now disseminating and causing the dissemination of certain advertisements concerning the aforesaid food and grocery products or other merchandise by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to advertisements in newspapers of general and interstate circulation and other advertising media, for the purpose of inducing, and which have been and are likely to induce, directly or indirectly, the purchase of said advertised products and other products from respondent; and respondent has been, and is now, disseminating and causing the dissemination of advertisements concerning said products by various means, including but not limited to the aforesaid media for the purpose of inducing, and which have been and are likely to induce, directly or indirectly, the purchase from respondent of the said advertised products and other products in commerce, as "commerce" is defined in the Federal Trade Commission Act. Many of the said advertisements list or depict the aforesaid food and grocery products, or other merchandise, and also contain statements and representations concerning the prices or terms at which said advertised products were being offered and presented for sale, as well as the time periods during which the offers would be in effect.

PAR. 5. Through the use of such advertisements disseminated in various areas of the United States served by respondent's retail food stores, respondent has represented directly or by implication that in those stores covered by such advertisements, throughout the effective periods of the advertised offers, the items listed or depicted in such advertisements would be:

A. Readily available for sale to customers;

B. Readily and conspicuously available for sale at or below the advertised prices; and

C. Sold to persons who attempted to purchase such items at prices at or below the advertised prices.

PAR. 6. In truth and in fact, in a significant number of respondent's retail food stores covered by such advertisements, during the effective periods of the advertised offers, a substantial number of the items listed or depicted in the said advertisements were:

A. Not readily available for sale;

B. Not readily and conspicuously available for sale at or below the advertised prices; or

C. Sold to persons who attempted to purchase such items at prices higher than the advertised prices.

Therefore, the statements and representations as referred to herein, were false, misleading and deceptive.

PAR. 7. By disseminating or causing the dissemination of advertisements which offer or present for sale items as aforesaid, and by failing to have, in a significant number of its stores covered by such advertisements, during the effective periods of the advertised offers, substantially all of the aforesaid advertised items:

A. Readily available for sale to customers in quantities sufficient to meet reasonably anticipated demands;

B. Conspicuously available for sale at or below the advertised prices;

and by selling substantial numbers of said items to persons attempting to purchase such items at prices in excess of the advertised price, respondent has engaged in unfair acts and practices.

PAR. 8. In the course and conduct of its business, and at all times referred to herein, respondent has been, and now is, in substantial competition in commerce, with corporations, partnerships, firms, and individuals in the retail food and grocery business.

PAR. 9. The use by respondent of the aforesaid unfair and false, misleading and deceptive statements, representations, acts and

practices, has had the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the said statements and representations were true, and to induce such persons to go to respondent's stores and to purchase from respondent substantial quantities of the advertised items at prices in excess of the advertised prices and substantial quantities of items other than the advertised items, some of those other items being higher priced or otherwise less desirable to Fisher customers than the unavailable advertised items, by reason of such erroneous and mistaken belief.

PAR. 10. The acts and practices as aforesaid were all to the prejudice and injury of the public and of respondent's competitors and constituted unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

Alleging violation of the Federal Trade Commission Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices (16 C.F.R. 424, *et seq.*), and Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One, Two, Three, Four and Eight, respectively, of Count I hereof are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 11. The Federal Trade Commission, pursuant to the Federal Trade Commission Act, as amended, 15 U.S.C. 41, *et seq.*, and the provisions of Subpart B, Part 1, of the Commission's Procedures and Rules of Practice, 16 C.F.R. 1.11, *et seq.*, conducted a proceeding for the promulgation of a trade regulation rule regarding retail food store advertising and marketing practices. Notice of this proceeding, including a proposed rule, was published in the *Federal Register* on November 14, 1969 (34 F.R. 18252). Interested parties were thereafter afforded opportunity to participate in the proceeding through the submission of written data, views, and arguments, and to appear and orally express their views as to the proposed rule and to suggest amendments, revisions, and additions thereto.

The Commission considered all matters of fact, law, policy, and discretion, including the data, views, and arguments presented on the record by interested parties in response to the Notice, as prescribed by law, determined that the adoption of the Trade Regulation Rule and Statement of its Basis and Purpose was in the public interest, and, accordingly, promulgated the Trade Regulation

Rule Concerning Retail Food Store Advertising and Marketing Practices on May 13, 1971, effective July 12, 1971.

PAR. 12. Respondent is a member of the retail food stores industry, and its acts and practices in connection with the sale of food and grocery products or other merchandise being subject to the jurisdiction of Section 5 of the Federal Trade Commission Act are within the intent and meaning of, and are subject to, the provisions of the aforesaid Trade Regulation Rule.

PAR. 13. In connection with its aforesaid advertisements, respondent, in a substantial number of instances, has failed to comply with Paragraph (1) of the aforesaid Trade Regulation Rule by offering food and grocery products or other merchandise subject to the jurisdictional requirements of Section 5 of the Federal Trade Commission Act for sale at stated prices by means of advertisements disseminated in areas served by certain of its stores which were covered by such advertisements but which, during the advertised sale periods, neither has such products in stock nor provided clear and adequate notice that the items were in stock and might be obtained upon request.

PAR. 14. In connection with its advertisements disseminated as aforesaid, respondent, in a substantial number of instances, has failed to comply with Paragraph (2) of the Trade Regulation Rule by offering products for sale at stated prices by means of advertisements disseminated in areas served by certain of its stores which are covered by such advertisements and by failing in those stores to charge out to persons who attempted to purchase such items, substantial numbers of such advertised products at prices at or below the advertised prices during the effective periods of the advertisements, thereby failing to make said advertised items conspicuously and readily available for sale at or below the advertised prices.

PAR. 15. Respondent's aforesaid violations of the Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices constitute unfair and deceptive acts and practices in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having heretofore issued its complaint charging the respondent, Fisher Foods, Inc., named in the caption hereto with violation of Section 5(a)(1) of the Federal Trade Commission Act, and the respondent, Fisher Foods, Inc., having been served with a copy of the complaint and with a copy of the notice of contemplated relief accompanying said complaint; and

The respondent and counsel for the Commission having thereafter

executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by the respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter issued an order withdrawing the matter described in the caption hereto from adjudication for the purpose of considering the proposed consent agreement pursuant to Section 3.25 of its Rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing a consent order having thereupon been placed on the public record for a period of sixty (60) days and the Commission having duly considered the comments filed pursuant to Sections 2.34 and 3.25 of its Rules, now in further conformity with the procedure prescribed in Section 3.25 of its Rules, the Commission hereby issues its decision in disposition of the proceeding against the above-named respondent, makes the following jurisdictional findings, and enters the following order:

1. Respondent Fisher Foods, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 5300 Richmond Road, Bedford Heights, Ohio.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding, and of the respondent, and the proceeding is in the public interest.

ORDER

I

Definitions

For purposes of this order:

A. "Respondent" means Fisher Foods, Inc., but does not include Fisher's existing wholly-owned subsidiary, Dominick's Finer Foods, Inc.

B. A "Retail Food Store" means one of respondent's Retail Food Stores in the Northern Ohio Division, in the Southern Ohio Division, or in the Los Angeles Division, other than a convenience store, *i.e.* a store having less than 4,000 square feet of floor space.

C. The "Northern Ohio Division" means the Retail Food Stores

located in the following counties in Ohio: Ashtabula, Cuyahoga, Geauga, Lake, Lorain, Mahoning, Medina, Portage, Stark, Summit, Trumbull, and Wayne.

D. The "Southern Ohio Division" means the Retail Food Stores located (1) in each county in Ohio other than the Ohio counties located in the Northern Ohio Division, and (2) in states contiguous to Ohio.

E. The "Los Angeles Division" means the Retail Food Stores located in, and in states contiguous to, California.

F. A "Northern Ohio Division Sample" means a selection of at least 25 percent (to the nearest whole number) of respondent's Retail Food Stores located in the Northern Ohio Division, 75 percent (to the nearest whole number) of which shall be randomly selected from the Ohio Counties of Cuyahoga, Lake, Lorain, and Summit, and 25 percent of which shall be randomly selected from respondent's Retail Food Stores in the other Ohio Counties which comprise the Northern Ohio Division.

G. A "Southern Ohio Division Sample" means a selection of at least 25 percent (to the nearest whole number) of respondent's Retail Food Stores located in the Southern Ohio Division.

H. A "Los Angeles Division Sample" means a selection of at least 25 percent (to the nearest whole number) of respondent's Retail Food Stores located in the Los Angeles Division, 75 percent (to the nearest whole number) of which shall be randomly selected from the California Counties of Los Angeles and Orange, and 25 percent of which shall be randomly selected from respondent's Retail Food Stores in the other California Counties which comprise the Los Angeles Division.

I. A "Survey" or a "Survey of the Sample" means a survey of the Northern Ohio Division Sample, Southern Ohio Division Sample, or Los Angeles Division Sample, conducted in accordance with the Survey Procedures set forth in Exhibit A, attached hereto and incorporated herein by reference. Stores to be surveyed shall be chosen in a manner that is consistent with the Survey Procedures. Respondent waives any right it might have to challenge the admissibility into evidence of the results of a Survey, or to challenge the evidentiary weight of a Survey based upon the size of the Sample. Respondent, however, retains the right to challenge the evidentiary weight to be given to the results of any such Survey on any other legally available basis.

J. The "Unadjusted Number of Unavailable Advertised Items" with respect to one of respondent's surveyed Retail Food Stores means the surveyed number of unavailable advertised items before

that number is reduced by any instances of unavailability that are excused by the defenses set forth in Trade Regulation Rule 424, as presently drafted, or in this order.

K. The "Adjusted Number of Unavailable Advertised Items" with respect to one of respondent's surveyed Retail Food Stores means the Unadjusted Number of Unavailable Advertised Items reduced by all instances of unavailability that are excused by the defenses set forth in Trade Regulation Rule 424, as presently drafted, or in this order.

L. The "Unadjusted Number of Over-Price-Marked or Overcharged Advertised Items" with respect to one of respondent's surveyed Retail Food Stores means the surveyed number of Over-Price-Marked or Overcharged Advertised Items before that number is reduced by any instances of overpricing or overcharging that are excused by the defenses set forth in Trade Regulation Rule 424, as presently drafted, or in this order.

M. The "Adjusted Number of Over-Price-Marked or Overcharged Advertised Items" with respect to one of respondent's surveyed Retail Food Stores means the Unadjusted Number of Over-Price-Marked or Overcharged Advertised Items reduced by all instances of over-price-marking or overcharging that are excused by the defenses set forth in Trade Regulation Rule 424, as presently drafted, or in this order.

N. The "Average Adjusted Rate of Unavailability" revealed by a Survey, as referred to in Paragraph III(B)(1) of this order, shall be determined as follows:

1. For each store surveyed, the Unadjusted Number of Unavailable Advertised Items shall be recorded and that number shall be reduced in accordance with the definition of "Adjusted Number of Unavailable Advertised Items" in this Order to ascertain the Adjusted Number of Unavailable Advertised Items in that store.

2. For each store surveyed, the number of items that the advertisement represents to be available in that store shall be recorded.

3. After the individual stores in the Sample have been surveyed, the sum, or aggregate, of the Adjusted Numbers of Unavailable Advertised Items recorded pursuant to Paragraph I(N)(1) shall be determined.

4. After the individual stores in the Sample have been surveyed, the sum, or aggregate, of the numbers of advertised items recorded pursuant to Paragraph I(N)(2) shall be determined.

5. The Average Adjusted Rate of Unavailability shall be the fraction of which the numerator is the sum, or aggregate, deter-

mined pursuant to Paragraph I(N)(3) and of which the denominator is the sum, or aggregate, determined pursuant to Paragraph I(N)(4).

O. The "Average Adjusted Rate of . . . Over-Price-Marking" revealed by a Survey as referred to in Paragraph III(D)(1) of this order, shall be determined as follows:

1. For each store surveyed, the Unadjusted Number of Over-Price-Marked Advertised Items shall be recorded and that number shall be reduced in accordance with the definition of "Adjusted Number of Over-Price-Marked Advertised Items" in this Order to ascertain the Adjusted Number of Over-Price-Marked Advertised Items in that store.

2. For each store surveyed, the number of items that the advertisement represents to be available in that store shall be recorded.

3. After the individual stores in the sample have been surveyed, the sum, or aggregate, of the Adjusted Numbers of Over-Price-Marked Advertised Items recorded pursuant to Paragraph I(O)(1) shall be determined.

4. After the individual stores in the Sample have been surveyed, the sum, or aggregate, of the numbers of advertised items recorded pursuant to Paragraph I(O)(2) shall be determined.

5. The Average Adjusted Rate of Over-Price-Marking shall be the fraction of which the numerator is the sum, or aggregate, determined pursuant to Paragraph I(O)(3), and of which the denominator is the sum, or aggregate, determined pursuant to Paragraph I(O)(4).

P. The "Average Adjusted Rate of . . . Overcharging" revealed by a survey as referred to in Paragraph III(D)(1) of this order shall be determined as follows:

1. For each store surveyed, the Unadjusted Number of Overcharged Advertised Items shall be recorded and that number shall be reduced in accordance with the definition of "Adjusted Number of Overcharged Advertised Items" in this order to ascertain the Adjusted Number of Overcharged Advertised Items in that store.

2. For each store surveyed, the number of items that the advertisement represents to be available in that store shall be recorded.

3. After the individual stores in the Sample have been surveyed, the sum, or aggregate, of the numbers of advertised items recorded pursuant to Paragraph I(P)(2) shall be determined.

4. After the individual stores in the Sample have been surveyed, the sum, or aggregate, of the numbers of advertised items recorded pursuant to Paragraph I(P)(2) shall be determined.

5. The Average Adjusted Rate of Overcharging shall be the

fraction of which the numerator is the sum, or aggregate, determined pursuant to Paragraph I(P)(3), and of which the denominator is the sum, or aggregate, determined pursuant to Paragraph I(P)(4).

Q. A "Perishable Item" means any item that will probably spoil or that will be substantially reduced in value if not sold on the day of delivery, or, in the case of prepared foods such as barbecued chicken or in-store baked products, on the day of preparation.

II

Prohibited Activities

It is ordered, That, in connection with respondent's advertising, offering for sale, sale or distribution of food or grocery products or other merchandise (hereinafter sometimes referred to as items) offered for sale or sold in its Retail Food Stores, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, that respondent forthwith cease and desist, directly or indirectly or through any device, from disseminating or causing the dissemination of any advertisement by any means that offers any items for sale at an advertised price unless, with respect to Paragraphs II(A), II(B), and II(C) below, respondent is complying with a specific exception, limitation, or restriction with respect to a store, item, or price that is clearly and conspicuously disclosed in all advertisements for the item in question (including but not limited to limitations or restrictions concerning the stores in which an item is available, the numeral quantities of an item available in each Retail Food Store, and the hours during which a Perishable Item is available), or unless, throughout the effective period of the advertised offer at each Retail Food Store covered by the advertisement:

A. Each advertised item is readily available for sale to customers in the public area of the store or, if not readily available there, a clear and conspicuous notice is posted where the item is regularly displayed indicating that the item is in stock and may be obtained upon request and the item is readily furnished upon request;

B. Each unit of each advertised item, any of which is marked with at least one price either on the item itself or on a sign at the point of display, is clearly and conspicuously marked with a price that is no higher than the advertised price; if any unit of an advertised item is marked with two or more different prices, the customer is charged the lowest of the prices, which is no higher than the advertised price;

C. Each unit of each advertised item is sold to customers at or below the advertised price;

except that no proceeding to enforce Paragraphs II(A), II(B), or II(C) of this order, pursuant to Section 5(*l*) of the Federal Trade Commission Act, as amended, that is based on a survey shall be instituted or commenced except on the basis of a Survey of a Sample of the Northern Ohio Division.

III

Defenses and Presumptions

A. Defenses to a charge of unavailability under Trade Regulation Rule 424, as presently drafted, Section 5 of the Federal Trade Commission Act, as amended, or any provisions of this order shall consist of every instance in which the Respondent can show:

1. That the advertised item was unavailable due to circumstances beyond respondent's control, that respondent did not have notice or knowledge of such impending unavailability in time to delete the item from the proposed advertisement, and that respondent offered to customers, for each unavailable item, a "raincheck" that (a) entitled the holder to purchase the item in the near future at or below the advertised price and (b) conspicuously disclosed on its face that, if the customer tendered the "raincheck" to Respondent more than three days, but less than 17 days, after receipt and the advertised item was still unavailable, the customer may elect, at his option, either to renew the "raincheck" for an additional two-week period or to receive a comparable item at or below the advertised price.

2. That the advertised items were delivered in adequate time to respondent's Retail Food Stores in quantities sufficient to meet reasonably anticipated demand. For purposes of this Paragraph III(A)(2):

(a) Respondent shall be deemed to have shown that it delivered an item to a store in quantities sufficient to meet reasonably anticipated demand in a particular advertisement period if it maintains records showing that it delivered that item to that store during that advertisement period in quantities equal to or greater than the quantities of that item sold by that store during the last preceding comparable advertisement period.

(b) The phrase, "quantities of that item sold by that store during the last preceding comparable advertisement period," for items other than meat, means the sum of the number of units in the closing inventory of the store after closing hours on the night before the first day of the advertisement period, *plus* the number of units delivered to the store during the advertisement period, *plus* the

number of "rainchecks" issued for that item during the advertisement period, and *minus* the number of units in the closing inventory of the store after closing hours on the last day of the advertisement period.

(c) The phrase, "delivered in adequate time," for items other than meat, means that, if respondent delivers more than one shipment of an item to a store in the comparable advertisement period, the "quantities of that item sold by that store during the . . . advertisement period" shall be apportioned among the deliveries in the particular advertisement period in such quantities that, by the comparable delivery date of the particular advertisement period, there shall have been delivered to the store at least the same proportion of quantities as were delivered by that date in the comparable period. For example, if the "quantities of that item sold by that store during the comparable advertisement period" for items other than meat were 110 units (100 units actually delivered and 10 "rainchecks" issued), and the units were delivered to the store in the comparable advertisement period in three deliveries consisting of 40 units on Monday, 40 units on Wednesday, and 20 units on Friday, respondent "will have delivered, in adequate time" if respondent delivers for the particular advertisement period, at least 40 percent (of the 110 units to be delivered) by Monday, 80 percent by Wednesday, and 100 percent by Friday.

(d) It shall be presumed that respondent has delivered meat items to a store in quantities sufficient to meet reasonably anticipated demand in a particular advertisement period when the sum of the number of primal cuts or carcasses containing that item in the closing inventory of the store after closing hours on the night before the first day of the particular advertisement period, *plus* the number of primal cuts or carcasses containing that item delivered to the store during the particular advertisement period, is equal to or greater than the sum of the number of primal cuts or carcasses containing that item in the closing inventory of the store after closing hours on the night before the first day of the comparable advertisement period, *plus* the number of primal cuts or carcasses containing that item delivered to the store during the comparable advertisement period, *minus* the number of primal cuts or carcasses containing that item in the closing inventory of the store after closing hours on the last day of the comparable advertisement period, taking into consideration the number of "rainchecks" issued and the frequency of delivery.

(e) The phrase, "last preceding comparable advertisement period" means, for a particular item, the last preceding advertisement period

(during which the item was advertised) that is most comparable to the particular advertisement period, considering the time of the year, the week of the month, weather conditions, the nature of the item, the amount of the price reduction, the location of the advertisement for the item with reference to the advertisement as a whole, the type size of the advertisement for the item, the availability of a coupon, the location of the product within the store, and any other relevant factors affecting a customer's buying habits.

(f) Each item that respondent can show it delivered to a Retail Food Store, included in the Sample, in quantities sufficient to meet reasonably anticipated demand, as provided herein, shall be employed herein as a defense in reducing the "Unadjusted Number of Unavailable Advertised Items" in computing the "Adjusted Number of Unavailable Advertised Items."

B. The following presumptions shall apply in ascertaining the availability to respondent of the defenses set forth in Paragraph III(A).

1. Because respondent has obligated itself, pursuant to Paragraph IV(C)(2) of this order, to institute, enforce, monitor, improve on the basis of experience, and maintain procedures designed to effect compliance with this order, it shall be presumed that the unavailability of all advertised items resulted from circumstances beyond respondent's control, within the meaning of Paragraph III(A)(1), if (a) the Average Adjusted Rate of Unavailability does not exceed 2/100 or 2 percent and (b) the unavailability revealed by the Survey is not shown to be caused in whole or in substantial part by the gross negligence or deliberate acts or omissions of respondent. (Sporadic unavailability caused by the gross negligence or deliberate acts or omissions of an insubstantial number of store level employees of respondent shall not negate the presumption if respondent can demonstrate that it took appropriate disciplinary action against the employees promptly after learning that the employees' gross negligence or deliberate acts or omissions caused the unavailability; persistent unavailability, however, caused by the gross negligence or deliberate acts or omissions of a substantial number of store level employees of respondent shall be attributed to respondent and shall negate the presumption.)

2. If, with respect to a Survey conducted in accordance with Paragraph IV(C) of this order, respondent is not advised in writing by the Federal Trade Commission or its staff within four months after receipt of a verified report from respondent as outlined in the Survey Procedures, or if respondent is not advised with respect to a Survey conducted by the Federal Trade Commission or its staff

within four months after the Commission or its staff receives documents from respondent concerning its defenses as set forth in Trade Regulation Rule 424, as presently drafted, or this order, that the Federal Trade Commission or its staff has reason to believe that respondent has failed to make advertised items available, in violation of Trade Regulation Rule 424, as presently drafted, Section 5 of the Federal Trade Commission Act, as amended, or this order, after taking into consideration the defenses set forth in Trade Regulation Rule 424, as presently drafted, or in this order, it shall be presumed that the alleged failure of respondent to make advertised items available was due to circumstances beyond respondent's control within the meaning of Paragraph III(A)(1). If on the other hand respondent is advised, within the prescribed period, of the position of the Federal Trade Commission or its staff, the advice shall indicate each specific item alleged to have been unavailable in identified stores on specified days.

C. Defenses to a charge of over-price-marking or overcharging under Trade Regulation Rule 424, as presently drafted, Section 5 of the Federal Trade Commission Act, or any provision of this order, shall consist of every instance in which the respondent can show:

1. That the advertised item was not marked or charged out at or below the advertised price due to circumstances beyond respondent's control, and that respondent, upon notice of knowledge of such over-price-marking or overcharging, acted immediately to price-mark the goods with, or charge out the goods at, the advertised price.

2. That, with respect to charges of over-price-marking in the case of stores equipped with devices that "read" an identification code (commonly referred to as the Universal Product Code) marked on the packaging of items and transmit the information to a computer that transmits the information to cash register tapes, with the items (and individual units thereof) not price-marked in any additional manner, the advertised price of such items was clearly and conspicuously posted at the point of display.

3. That, in the case of advertised items the ultimate price of which is to be determined by the total dollar amount of the customer's order or the use of a coupon or other similar price arrangement, the price at which the item is sold, and not the price marked on the item, shall govern.

D. The following presumptions shall apply in determining the availability to respondent of the defenses set forth in Paragraph III(C).

1. Because respondent has obligated itself, pursuant to Paragraph IV(C)(2) of this order, to institute, enforce, monitor, improve

on the basis of experience, and maintain procedures designed to effect compliance with this order, it shall be presumed that the over-price-marking or overcharging of all advertised items resulted from circumstances beyond respondent's control within the meaning of Paragraph III(C)(1) if (a) neither the Average Adjusted Rate of Over-Price-Marking nor the Average Adjusted Rate of Overcharging exceeds 1/100 or 1 percent, and (b) the over-price-marking or overcharging revealed by the Survey is not shown to be caused in whole or in substantial part by the gross negligence or deliberate acts or omissions of respondent. (Sporadic over-price-marking or overcharging caused by the gross negligence or deliberate acts or omissions of an insubstantial number of store level employees of respondent shall not negate the presumption if respondent can demonstrate that it took appropriate disciplinary action against the employees promptly after learning that the employees' gross negligence or deliberate acts or omissions caused the over-price-marking or overcharging; however, persistent over-price-marking or overcharging caused by the gross negligence or deliberate acts or omissions of a substantial number of store level employees of respondent shall be attributed to respondent and shall negate the presumption.)

2. If, with respect to a Survey conducted in accordance with Paragraph IV(C) of this order, respondent is not advised in writing by the Federal Trade Commission or its staff within four months after receipt of a verified report from respondent as outlined in the Survey Procedures, or if respondent is not advised with respect to a Survey conducted by the Federal Trade Commission or its staff within four months after the Commission or its staff receives documents from respondent concerning its defenses as set forth in Trade Regulation Rule 424, as presently drafted, or this order, that the Federal Trade Commission or its staff has reason to believe that respondent has failed to price-mark or charge out advertised items at the advertised prices, in violation of Trade Regulation Rule 424, as presently drafted, Section 5 of the Federal Trade Commission Act, as amended, or this order, after taking into consideration the defenses set forth in Trade Regulation Rule 424, as presently drafted, or in this order, it shall be presumed that the alleged failure of respondent to make advertised items available at or below the advertised price was due to circumstances beyond respondent's control within the meaning of Paragraph III(C)(1). If on the other hand respondent is advised, within the prescribed period, of the position of the Federal Trade Commission or its staff, the advice shall indicate each specific

item alleged to have been over-price-marked or overcharged in identified stores on specified days.

IV

Additional Obligations of Respondent

A. *It is further ordered,* That, throughout each advertisement period in each of its Retail Food Stores covered by an advertisement, Respondent shall post conspicuously, at or near each doorway affording entrance to the public, and at or near the place where customers pay for merchandise:

1. A copy of any printed advertisement.
2. The following statement:

NOTICE

All items advertised for sale in this store are "required to be readily available for sale" at or below the advertised price, except as otherwise specifically noted in the advertisement.

If an advertised item you wish to purchase is unavailable, please request a "raincheck" from the store office.

If two (or more) prices appear on a unit of an item, you will be charged the lower (or lowest) of the prices marked; in no event will you be charged more than the advertised price.

If you have any questions, the store manager will be glad to assist you.

B. *It is further ordered,* That respondent shall cause the following statement to be clearly and conspicuously set forth in each printed advertisement that represents that items are available for sale at any of its Retail Food Stores:

Each of these advertised items is "required to be readily available for sale" in each store, except as otherwise specifically indicated in this advertisement.

C. *It is further ordered,* That:

1. Respondent shall forthwith deliver a copy of this order to the head of its operating divisions and to each of its officers and other personnel in its organization down to the level of, and including, assistant store managers who, directly or indirectly, have any supervisory responsibilities relating to (a) the availability or price-marking of advertised items in respondent's Retail Food Stores and (b) check stand operations or who are engaged in any aspect of the preparation, creation, or placing of advertising; respondent shall promptly deliver a copy of this order to any person who is hereafter elected in or placed in one of these positions. Respondent shall secure

a signed statement acknowledging receipt of the order from each such person.

2. Respondent shall institute, enforce, monitor, improve on the basis of experience, and maintain a program (including a continuing surveillance procedure) that is designed to effect compliance with this order and to reveal whether the business practices of each of its Retail Food Stores conform to this order, and shall confer with a representative of the Federal Trade Commission pertaining to the program when requested to do so by such representative. This program shall include five Surveys of respondent's Retail Food Stores by an independent organization, conducted according to the Survey Procedures and within the time limitations hereinafter prescribed, with the commencement date for each of these Surveys to be selected by the Federal Trade Commission or its staff. Respondent shall not modify any Survey procedure or form without prior Commission approval. At least one of these Surveys shall be conducted using a Sample of the Northern Ohio Division and shall be conducted between six months after the effective date of this order and four years after the effective date of this order. At least one of these Surveys shall be conducted using a Sample of the Southern Ohio Division and shall be conducted between one year after the effective date of this order and four years after the effective date of this order. Each of the remaining two Surveys shall be conducted in any of the three divisions chosen by the Federal Trade Commission or its staff and shall be conducted between one year after the effective date of this order and four years after the effective date of this order, except that no Survey of the same division shall be commenced earlier than six months after the commencement of an earlier Survey of the same division. The results of each of these Surveys, the defenses of respondent, and any underlying documents shall be provided to the Federal Trade Commission or its staff within four months after the completion of the Survey.

3. The results of any Survey, any defenses of the respondent, and any underlying documents, as they relate to respondent's Retail Food Stores located in the Southern Ohio Division or in the Los Angeles Division, may be used by the Federal Trade Commission in any proceeding under the Federal Trade Commission Act, as amended, other than a proceeding to enforce Paragraph II of this order. The results of any Survey, any defenses of the respondent, and any underlying documents, as they relate to respondent's Retail Food Stores located in the Northern Ohio Division, may be used by the Federal Trade Commission in any proceeding under the Federal Trade Commission Act, as amended. As set forth in Paragraph I(I),

respondent waives any right it might have to challenge the admissibility into evidence of the results of a Survey or to challenge the evidentiary weight of the Survey based upon the size of the Sample; respondent, however, retains the right to challenge the evidentiary weight to be given to the results of any such Survey on any other legally available basis.

4. Respondent shall, for a period of five years after the effective date of this order:

a. Maintain business records which show respondent's efforts taken to ensure continuing compliance with the terms and provisions of this order;

b. Grant a representative of the Federal Trade Commission access to all such business records, during normal business hours and for reasonable periods of time;

c. Furnish to the Federal Trade Commission or its staff copies of such records when they are requested by any representative of the Federal Trade Commission possessing authority to make such request.

5. Respondent shall, all other provisions of this order notwithstanding, for a period of four years after the effective date of this order, file with the Commission an annual report in writing revealing the effectiveness of the steps or actions taken by respondent with regard to the aforesaid program (including a continuing surveillance procedure) and setting forth in detail the manner and form in which it has complied with this order in the preceding year.

D. *It is further ordered,* That Fisher shall notify the Commission at least 30 days prior to any proposed change in its corporate existence (such as dissolution, assignment, or sale) resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in Fisher that may affect compliance obligations arising out of this order.

E. *It is further ordered,* That respondent herein shall within 60 days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

FOOD FAIR STORES, INC. ALSO TRADING AS PANTRY PRIDE

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2912. Complaint, Nov. 11, 1977 — Decision, Nov. 11, 1977

This consent order, among other things, requires a Philadelphia, Pa. retail food store chain to make each of its advertised items readily available for sale to customers in its stores, to have advertised items correctly priced, and to sell those items at or below the advertised price. Further, the firm must post copies of advertisements and notices of the availability of "rainchecks" for unavailable items.

Appearances

For the Commission: *Bernard Rowitz, Alan L. Cohen* and *Irvin E. Abrams.*

For the respondent: *Stein, Mitchell & Mezines,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Food Fair Stores, Inc., a corporation, also trading and doing business as Pantry Pride, hereinafter sometimes referred to as respondent, has engaged in acts and practices contrary to the Commission's Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices (16 C.F.R. 424) in violation of the Federal Trade Commission Act, as amended, and has also engaged in acts and practices in violation of the provisions of the above-mentioned Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

COUNT I

Alleging violation of Section 5 of the Federal Trade Commission Act, as amended.

PARAGRAPH 1. Respondent, Food Fair Stores, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania with its office and principal place of business located at 3175 John F. Kennedy

Boulevard, Philadelphia, Pennsylvania. Respondent also operates, trades and does business under the name of Pantry Pride.

PAR. 2. Respondent is engaged in the operation of a chain of retail food stores, buying and selling a wide variety of food and grocery products. Respondent operates retail food stores in Pennsylvania, New Jersey, Maryland, Florida and other States in the United States. Its volume of business is substantial. In the operation of its retail food stores, respondent offers and presents for sale to its customers, and sells to its customers, an extensive line of products, including food, groceries and other merchandise, all of which are sometimes referred to hereafter as "items." Many of said items are purchased from numerous suppliers located throughout the United States.

PAR. 3. In the course and conduct of its business, as aforesaid, respondent now causes, and for some time last past has caused, directly or indirectly, the aforesaid items to be shipped and distributed from manufacturing and processing plants or from other sources of supply to its warehouses, distribution centers, or retail food stores located in various states other than the state of origination, distribution or storage of said items. Respondent maintains, and at all times mentioned herein has maintained a substantial course of trade in the distribution, advertising, offering for sale and sale of the aforesaid items in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. In the course and conduct of its business, as aforesaid, and for some time last past respondent has been and is now disseminating, and causing the dissemination of, certain advertisements concerning the aforesaid items by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, including but not limited to, advertisements in newspapers of general and interstate circulation and other advertising media, for the purpose of inducing and which were and are likely to induce, directly or indirectly, the purchase of said items from respondent; and respondent has been and is now disseminating, and causing the dissemination of, advertisements concerning said items by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were and are likely to induce, directly or indirectly, the purchase from respondent of the said items in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended. Many of the said advertisements list or depict the aforesaid items and also contain statements and representations concerning the price or terms at which said

items would be offered for sale. Many of the aforesaid advertisements contain further direct and express statements and representations concerning the time periods during which the offers would be in effect and the locations of respondent's food stores at which the offers would be made.

PAR. 5. Through the use of such advertisements disseminated, and now being disseminated, in various areas of the United States served by respondent's retail food stores, respondent has represented, and is now representing, directly or by implication, that in those stores covered by such advertisements, throughout the effective periods of the advertised offers, the items listed or depicted in such advertisements would be or are:

A. Readily available for sale to customers;
B. Readily available for sale at or below the advertised prices.

PAR. 6. In truth and in fact, in a number of respondent's retail food stores covered by such advertisements, during the effective periods of the advertised offers, a number of items listed or depicted in the said advertisements were or are:

A. Not readily available for sale;
B. Not readily available for sale at or below the advertised prices.

Therefore, the statements and representations as referred to herein, were and are false, misleading and deceptive, and each of such advertisements was and is misleading in material respects.

PAR. 7. By disseminating or causing the dissemination of advertisements which offer or present for sale items as aforesaid, and by failing to have in each of its stores covered by such advertisements, throughout the effective periods of the advertised offers, in quantities sufficient to meet reasonably anticipated demands, the advertised items:

A. Readily available for sale to customers; or
B. Readily available for sale at or below the advertised prices;

respondent has been and now is engaged in unfair acts and practices.

PAR. 8. By disseminating or causing the dissemination of advertisements which offer or present for sale items at specific prices, as aforesaid, and during the effective periods of such advertised offers at certain stores covered by said advertisements, by marking said items or permitting said items to remain marked at prices higher than the advertised prices, respondent has been and now is engaged in unfair acts and practices.

PAR. 9. In the course and conduct of its business, and at all times referred to herein, respondent has been and now is in substantial competition in or affecting commerce, with corporations, partnerships, firms and individuals in the retail food and grocery business.

PAR. 10. The use by respondent of the aforesaid unfair and false, misleading and deceptive statements, representations, acts and practices, including the dissemination of the aforesaid advertisements, has had and now has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the said statements and representations were and are true, and to induce such persons to go to respondent's stores and to purchase from respondent substantial quantities of the advertised items at prices in excess of the advertised prices and substantial quantities of items other than the advertised items.

PAR. 11. The acts and practices as aforesaid, and the dissemination by respondent of the false advertisements, as aforesaid, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted and now constitute unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

COUNT II

Alleging violations of the Federal Trade Commission Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices (16 C.F.R. 424), the allegations of Paragraphs One, Two, Three, Four, and Nine, respectively, of Count I hereof are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 12. The Federal Trade Commission, pursuant to the Federal Trade Commission Act, as amended, 15 U.S.C. 41, *et seq.*, and the provisions of Subpart B, Part 1, of the Commission's Procedures and Rules of Practice, 16 C.F.R. 1.11, *et seq.*, conducted a proceeding for the promulgation of a trade regulation rule regarding retail food store advertising and marketing practices. Notice of this proceeding, including a proposed rule, was published in the *Federal Register* on November 14, 1969 (34 F.R. 18252). Interested parties were thereafter afforded opportunity to participate in the proceeding through the submission of written data, views, and arguments, and to appear and orally express their views as to the proposed rule and to suggest amendments, revisions, and additions thereto.

The Commission considered all relevant matters of fact, law,

policy, and discretion, including the data, views, and arguments presented on the record by interested parties in response to the Notice as indicated in the accompanying Statement of Basis and Purpose (36 F.R. 8777 (May 13, 1971)) and as prescribed by law, determined that the adoption of the trade regulation rule was in the public interest, and, accordingly, promulgated the Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices on May 13, 1971, effective July 12, 1971.

PAR. 13. Respondent is a member of the retail food store industry, and its acts and practices in connection with the sale and offering for sale of food and grocery products or other merchandise are subject to the jurisdiction of Section 5 of the Federal Trade Commission Act, as amended, and are within the intent and meaning of, and are subject to, the provisions of the aforesaid trade regulation rule.

PAR. 14. In connection with its aforesaid advertisements, respondent, in many instances, has failed to comply with the aforesaid trade regulation rule by offering food and grocery products or other merchandise for sale at a stated price by means of advertisements disseminated in areas served by certain of its stores which were covered by the advertisement but which did not have such products in stock and readily available for sale to customers during the effective period of the advertisement.

PAR. 15. In connection with its advertisements disseminated as aforesaid, respondent, in many instances, has failed to comply with the aforesaid trade regulation rule by failing to make certain of the advertised items conspicuously and readily available for sale at or below the advertised prices.

PAR. 16. Respondent's aforesaid violations of the Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices constitute violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of Food Fair Stores, Inc., a corporation, also trading and doing business as Pantry Pride, hereinafter sometimes referred to as respondent, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Washington, D.C. Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act, as amended; and

The respondent and counsel for the Commission having thereafter

executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Food Fair Stores, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania. Respondent also operates, trades and does business under the name Pantry Pride.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondent Food Fair Stores, Inc., a corporation, also trading and doing business as Pantry Pride, or under any name or names, its successors or assigns, its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of food or grocery products or other merchandise, hereinafter sometimes referred to as items, offered or sold in its retail food stores, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from, directly or indirectly:

A. Disseminating, or causing the dissemination of, any advertisement by any means which offers any items for sale at a stated price, unless throughout the effective period of the advertised offer at each retail food store covered by the advertisement:

1. Each advertised item is readily available for sale to customers in the public area of the store;

2. Each unit of each advertised item, any of whose units are marked with a price, is individually, clearly, and conspicuously marked with a price no higher than the advertised price;

3. Each advertised item is sold to customers at or below the advertised price.

Provided, that it shall not be deemed a violation of the above subparagraphs A.1, A.2, A.3, if respondent is complying with a specific exception, limitation or restriction with respect to store, item or price which is clearly and conspicuously disclosed in all advertisements for the product in question.

Provided, further, that it shall constitute a defense to a charge of unavailability under subparagraph I.A.1. if respondent has posted a clear and conspicuous notice where the item is regularly displayed which states that the item is in stock and may be obtained upon request, and said item is furnished on request.

Provided, further, it shall constitute a defense to a charge of unavailability under subparagraph I.A.1. if respondent maintains and furnishes or makes available for inspection and copying upon the request of the Federal Trade Commission, such records and affidavits as will show that (a) the advertised items were delivered to or were on hand in its food stores in quantities sufficient to meet reasonably anticipated demand, or (b) the advertised items were ordered but not delivered due to circumstances beyond respondent's control, and that respondent, upon notice or knowledge of such non-delivery, acted immediately to contact the media to correct any future advertisement (including the same ad run at some future date) to delete or to reflect the limited availability of such items, and (c) respondent offered to customers on inquiry a "raincheck" for each unavailable item which entitled the holder to purchase the item in the near future at or below the advertised price.

If respondent or any of its employees, agents or representatives are not advised of an alleged instance of unavailability through any source including the Federal Trade Commission within three months of its occurrence, it shall be presumed that the records called for by this proviso were in the possession of respondent showing (a) or (b), and (c), *unless* clear and convincing evidence establishes the contrary.

Provided, that in the case of advertised items the ultimate prices of whose units are determined by the total dollar amount of the customer's order or the use of a coupon, or other similar conditional

price arrangement, the prices at which the units are sold, and not the prices marked on the units, shall govern.

In determining compliance with Section I of this order, the Commission will consider the circumstances surrounding failure to make advertised items conspicuously and readily available for sale at or below the advertised prices due to circumstances beyond respondent's control. In considering what circumstances shall be considered "beyond respondent's control" the Commission will consider instances of demonstrable human error where such error appears excusable under all of the facts and circumstances and is not indicative of a pattern of non-compliance or attributable to company negligence in following surveillance procedures.

II

It is further ordered, That throughout each advertised sale period in each of its retail food stores covered by an advertisement, respondent shall post conspicuously (1) at or near each doorway affording entrance to the public, and (2) at or near the place where customers pay for merchandise, notices which contain the following:

A. A copy of the advertisement.

B. A statement that: "All items advertised are readily available for sale at or below the advertised price. In the event you are unable to find any advertised item, please ask any employee. If we cannot supply you with any advertised item, a raincheck will gladly be issued entitling you to purcahse such item in the near future at the advertised price. Instead of a raincheck, you may ask for a comparable item at the advertised price.

Please ask our store manager if you have any questions. He will be pleased to assist you."

III

It is further ordered, That:

A. Respondent shall forthwith deliver a copy of this order to each of its operating divisions and to each of its present and future officers and other personnel in its organization, down to the level of store managers, who, directly or indirectly, have any supervisory responsibilities as to individual retail food stores of respondent, or who are engaged in a supervisory capacity in any aspect of preparation, creation, or placing of advertising, and that respondent shall secure a signed statement acknowledging receipt of said order from each such person;

B. Respondent shall institute and maintain a program of

continuing surveillance adequate to reveal whether the business practices of each of its retail food stores conform to this order, and shall confer with any duly authorized representative of the Commission pertaining to such program when requested to do so by a duly authorized representative of the Commission;

C. Respondent shall, for a period of three (3) years subsequent to the date of this order:

1. Maintain business records which show the efforts taken to insure continuing compliance with the terms and provisions of this order;

2. Grant any duly authorized representative of the Federal Trade Commission access to all such business records;

3. Furnish to the Federal Trade Commission copies of such records which are requested by any of its duly authorized representatives;

D. Respondent shall, all other provisions of this order notwithstanding, on or before each of the first three (3) anniversary dates of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order in the preceding year.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the respondent which may affect compliance obligations arising out of this order.

IN THE MATTER OF

SHOP-RITE FOODS, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2913. Complaint, Nov. 11, 1977 — Decision, Nov. 11, 1977

This consent order, among other things, requires a Grand Prairie, Tex. retail food store chain, to make each of its advertised items readily available for sale to customers in its stores, to have advertised items correctly priced, and to sell those items at or below the advertised price. Further, the firm must post copies of advertisements and notices of the availability of "rainchecks" for unavailable items.

Appearances

For the Commission: *Donald Higginbotham* and *Jim B. Brookshire.*

For the respondent: *Glenn A. Mitchell, Stein, Mitchell & Mezines,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Shop-Rite Foods, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereto would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

COUNT I

(Alleging violation of Section 5 of the Federal Trade Commission Act)

PARAGRAPH 1. Respondent, Shop-Rite Foods, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Mexico with its office and principal place of business located at 2401 West Marshall Drive, Grand Prairie, Texas.

PAR. 2. Respondent, through its wholly-owned subsidiaries is engaged in the operation of a chain of retail food stores, operating over 100 stores in three (3) states. Its volume of business is substantial, totaling approximately $282 million in retail food sales in 1974. In the operation of its retail food stores, respondent offers for

sale and sells to its customers an extensive line of products, including food, drugs, cosmetics and devices as those terms are defined in the Federal Trade Commission Act, as amended, all of which are sometimes referred to hereinafter as "items." Some of said items are manufactured or processed by respondent at its manufacturing and processing plants located in various states. However, many of said items are purchased from numerous independent suppliers located throughout the United States.

PAR. 3. In the course and conduct of its business, as aforesaid, respondent now causes, and for sometime last past has caused, directly or indirectly, the aforesaid items to be shipped and distributed from its manufacturing and processing plants or from its other sources of supply to its warehouses, distribution centers, or retail food stores located in various states other than the state of origination, distribution or storage of said items. In the further course and conduct of its business, respondent transmits contracts, business correspondence, monies and other documents from its stores, offices, and divisions located in states other than the state in which such contracts, correspondence, monies, and other documents originated. Respondent maintains, and at all times mentioned herein, has maintained a substantial course of trade in the distribution, advertising, offering for sale and sale of the aforesaid items in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. In the course and conduct of its business, as aforesaid, and for some time last past, respondent has been and is now disseminating, and causing the dissemination of, certain advertisements concerning the aforesaid items by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, including, but not limited to, advertisements in newspapers of general and interstate circulation and other advertising media, for the purpose of inducing and which are now and were likely to induce, directly or indirectly, the purchase of said items from respondent; and respondent has been and is now disseminating and causing the dissemination of, advertisements concerning said items by various means, including but not limited to the aforesaid items by various means, including but not limited to the aforesaid media, for the purpose of inducing and which are now and were, likely to induce, directly or indirectly, the attempted or actual purchase from respondent of the said items in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended. Many of the said advertisements list or depict the aforesaid items and also contain statements and representations

concerning the price or terms at which said items would be offered for sale. Many of the aforesaid advertisements contain further direct and express statements and representations concerning the time periods during which the offers would be in effect and the locations of respondent's food stores at which the offers would be made.

PAR. 5. Through the use of such advertisements disseminated in various areas of the United States served by respondent's retail food stores, respondent has represented directly or by implication that in those stores covered by such advertisements, throughout the effective periods of the advertised offers, the items listed or depicted in such advertisements would be:

A. Readily available for sale to customers;

B. Readily and conspicuously available for sale at or below the advertised prices; and

C. Sold to persons who attempted to purchase such items at prices at or below the advertised prices.

PAR. 6. In truth and in fact, in a significant number of respondent's retail food stores covered by such advertisements, during the effective period of the advertised offers, a substantial number of the items listed or depicted in the said advertisements were:

A. Not readily available for sale;

B. Not readily and conspicuously available for sale at or below the advertised prices; or

C. Sold to persons who attempted to purchase such items at prices higher than the advertised prices.

Therefore, the statements and representations as referred to herein, were false, misleading and deceptive, and each of such advertisements were misleading in material respects and constituted a "false advertisement," as that term is defined in the Federal Trade Commission Act, as amended.

PAR. 7. By disseminating or causing the dissemination of advertisements which offer or present for sale items as aforesaid, and by failing to have, in a significant number of its stores covered by such advertisements, during the effective periods of the advertised offers, substantially all of the aforesaid advertised items:

A. Readily available for sale to customers in quantities sufficient to meet reasonably anticipated demands; and

B. Conspicuously available for sale at or below the advertised prices;

and by selling substantial numbers of said items to persons attempting to purchase such items at prices in excess of the

advertised price, respondent has engaged in unfair acts and practices.

PAR. 8. In the course and conduct of its business as aforesaid, and at all times referred to herein, respondent has been and now is in substantial competition in commerce, with corporations, partnerships, firms and individuals in the retail food and grocery business.

PAR. 9. The use by respondent of the aforesaid unfair and false, misleading and deceptive statements, representations, acts and practices, including the dissemination of the aforesaid "false advertisements," has had the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the statements and representations were and are true, and to induce such persons to go to respondent's stores and to purchase from respondent, substantial quantities of the advertised items at prices in excess of the advertised prices and substantial quantities of items other than the advertised items, some of those items being higher priced or otherwise less desirable to Shop-Rite Foods, Inc., customers than the unavailable advertised items, by reason of such erroneous and mistaken beliefs.

PAR. 10. The acts and practices as aforesaid, and the disseminations by respondent of the false advertisements, as aforesaid, were all to the prejudice and injury of the public and of respondents' competitors and constituted unfair methods of competition in or affecting commerce and unfair or deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

COUNT II

(Alleging violations of the Federal Trade Commission Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices (16 C.F.R. Section 424), and Section 5 of the Federal Trade Commission Act, the allegations set forth in Paragraphs One, Two, Three, Four, and Ten, respectively, of Count I hereof are incorporated by reference in Count II as if fully set forth verbatim)

PAR. 11. The Federal Trade Commission, pursuant to the Federal Trade Commission Act, as amended, 15 U.S.C. 41, *et seq.* and the Rules of Practice, 16 C.F.R. 1.11, *et seq.* conducted a proceeding for the promulgation of a trade regulation rule regarding retail food store advertising and marketing practices. Notice of this proceeding, including a proposed rule, was published in the *Federal Register* on November 14, 1969 (34 F.R. 18252). Interested parties were thereaf-

ter afforded opportunity to participate in the proceeding through the submission of written data, views, and arguments, and to appear and orally express their views as to the proposed rule and to suggest amendments, revisions, and additions thereto.

The Commission considered all relevant matters of fact, law, policy, and discretion, including the data, views, and arguments presented on the record by interested parties in response to the Notice as indicated in the accompanying Statement of Basis and Purpose (36 F.R. 8777 (May 13, 1971)) and as prescribed by law, determined that the adoption of the Trade Regulation Rule was in the public interest, and, accordingly, promulgated the Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices on May 13, 1971, effective July 12, 1971.

PAR. 12. Respondent is a member of the retail food store industry, and its acts and practices in connection with the sale and offering for sale of food and grocery products or other merchandise being subject to the jurisdiction of Section 5 of the Federal Trade Commission Act are within the intent and meaning of, and are subject to, the provisions of the aforesaid Trade Regulation Rule.

PAR. 13. In connection with its aforesaid advertisements, respondent, in a substantial number of instances, has failed to comply with Paragraph (1) of the aforesaid Trade Regulation Rule by offering food and grocery products or other merchandise subject to the jurisdictional requirements of Section 5 of the Federal Trade Commission Act for sale at stated prices by means of advertisements disseminated in areas served by certain of its stores which were covered by such advertisements but which during the advertised sale period neither had such products in stock readily available for sale to customers nor provided clear and adequate notice that the items were in stock and might be obtained upon request.

PAR. 14. In connection with its advertisements disseminated as aforesaid, respondent, in a substantial number of instances, has failed to comply with Paragraph (2) of the aforesaid Trade Regulation Rule by offering food and grocery products or other merchandise subject to the jurisdictional requirements of Section 5 of the Federal Trade Commission Act for sale at stated prices by means of advertisements disseminated in areas served by certain of its stores which were covered by such advertisements and by failing in those stores to make certain of the advertised items conspicuously and readily available for sale at or below the advertised prices during the effective periods of the advertisements, and by failing to charge out to persons who attempted to purchase items substantial

numbers of such advertised products at prices at or below the advertised prices during the effective periods of the advertisements.

PAR. 15. Respondent's aforesaid violations of the Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices constitute unfair and deceptive acts and practices in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of Shop-Rite Foods, Inc., a corporation, hereinafter sometimes referred to as respondent, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Dallas, Texas Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act, as amended; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent, Shop-Rite Foods, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Mexico, with its office and principal place of business located at 2401 West Marshall Drive, Grand Prairie, Texas.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondent, Shop-Rite Foods, Inc., a corporation, its successors or assigns, its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of food or grocery products or other merchandise, hereinafter sometimes referred to as items, offered or sold in its retail stores, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from, directly or indirectly:

A. Disseminating, or causing the dissemination of any advertisement by any means which offers or presents any items for sale, unless during the effective period of the advertised offer at each retail store covered by the advertisement:

1. Each advertised item is in stock and readily available to customers, or if not readily available, clear and adequate notice shall be provided that the items are in stock and may be obtained upon request;

2. Each unit of each advertised item, any of whose units are marked with a price, is individually, clearly, and conspicuously marked with a price no higher than the advertised price;

3. Each unit of each advertised item is charged out to customers at a price which is at or below the advertised price;

Provided, however, that it shall constitute a defense to a charge of violation under subparagraph I.A.1. if respondent maintains and furnishes or makes available for inspection and copying upon the request of the Federal Trade Commission, such records as will show that (a) *the advertised items were ordered in adequate time for delivery or were delivered to the stores in quantities sufficient to meet reasonably anticipated demands during the advertised sales period or (b) the advertised items were ordered in quantities sufficient to meet reasonably anticipated demands but were not delivered due to circumstances beyond respondent's control, and that respondent, upon notice or knowledge of such nondelivery immediately offers to customers a choice of a "rain check" for each unavailable item which entitles the holder to purchase the item in the future at or below the advertised price, or a similar product of equal or better quality at or below the advertised price of the unavailable product.*

Provided, further, that it shall not be deemed a violation of

subparagraphs I.A.1, I.A.2, or I.A.3, if respondent is complying with a specific exception, limitation or restriction with respect to store, item or price which is clearly and conspicuously disclosed in all advertisements for the product in question.

Provided, further, however, that if respondent or any of its employees, agents, or representatives are not advised of an alleged instance of unavailability through any source, including the Federal Trade Commission, within six months of its occurrence, it shall be presumed that the records called for by this subparagraph were in the possession of respondent and that quantities of the advertised items adequate to meet reasonably anticipated demand had been ordered in adequate time for delivery prior to the sale and were delivered.

Provided, further, that in the case of advertised items the ultimate price of which is to be determined by the total dollar amount of the customer's order or the use of a coupon, or other similar price arrangement, the price at which the item is sold, and not the price marked on the item, shall govern.

Provided, further, that in stores equipped with optical scanning devices which electronically "read" the identification numbers marked on the packaging of such units, and which transmit the identification number to in-store computers which then transmit the correct prices of the items to electronic cash registers where the prices are displayed and printed on cash register tapes, the units need not be pricemarked in any additional manner; furthermore, clear and conspicuous posting of the advertised prices of such items at the point of the display will be deemed in compliance with this requirement provided that the units of such items are sold to customers at or below the advertised prices throughout the advertised sale period.

II

It is further ordered, That respondent Shop-Rite Foods, Inc., a corporation, its successors or assigns, its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of food or drugs, as those terms are defined in the Federal Trade Commission Act, do forthwith cease and desist from, directly or indirectly:

A. Disseminating or causing to be disseminated, by United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, for the

purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of any such product, subject to the jurisdictional requirements of Section 5 of the Federal Trade Commission Act, as amended, any advertisement which contains any of the offers prohibited by Section I of this order;

B. Disseminating or causing to be disseminated by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of any such product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, subject to the jurisdictional requirements of Section 5 of the Federal Trade Commission Act, as amended, any advertisement which contains any of the offers prohibited by Section I of this order.

III

It is further ordered, That throughout each advertised sale period in each of its retail stores covered by an advertisement, respondent shall display conspicuously at or near the place where customers pay for merchandise:

A. A copy of the advertisement and;

B. The following statement:

All items advertised are required by law to be readily available for sale at or below the advertised prices in each store except as specifically noted in this ad.

If an advertised item you wish to purchase is unavailable, you may obtain a raincheck that will enable you to purchase this item at the advertised price in the near future. Or, you will be allowed to purchase immediately, a similar product of equal or better quality at the advertised price of the unavailable advertised item.

If you have any questions, the store manager will be glad to assist you.

In order to avoid overcharging that might result from incorrect price marking, we ask each of our customers to inspect the price marked (if any) on each item he or she selects to insure that such price is correct and to report instances of merchandise being marked with an incorrect price to store personnel. We are legally obligated to make available any advertised item at the advertised price during the applicable advertised sale period regardless of the price marked on any unit of the advertised item. (In the case of coupon offers or minimum purchase orders, you must, of course, have the appropriate coupon or make the required minimum purchase in order to receive the advertised price.)

If any checker, when confronted by you with the fact that he or she

is about to ring up, or he or she has rung up, an advertised price, refuses to correct the error immediately or to ring up the item at the advertised price, you are requested to report the incident to the store manager.

IV

It is further ordered, That respondent shall cause the following statement to be clearly and conspicuously set forth in each advertisement which represents that items are available for sale at a stated price at any of its stores: "Each of these advertised items is required to be readily available for sale at or below the advertised price in each store, except as specifically noted in this ad."

V

It is further ordered, That:

A. Respondent shall forthwith deliver a copy of this order to each of its operating divisions and to each of its present and future officers and other personnel in its organization down to the level of and including assistant store managers who, directly or indirectly, have any supervisory responsibilities relating in any way to availability, pricing or charging out of advertised items as to individual retail stores of respondent, or who are engaged in any aspect of preparation, creation, or placing of advertising, and that respondent shall secure a signed statement acknowledging receipt of said order from each such person;

B. Respondent shall institute and maintain a program of continuing surveillance adequate to reveal whether the business practices of each of its retail stores conform to this order, and shall confer with any duly authorized representative of the Commission pertaining to such program when requested to do so by a duly authorized representative of the Commission;

C. Respondent shall, for a period of three (3) years subsequent to the date of service of this order:

1. Maintain business records which show the efforts taken to insure continuing compliance with the terms and provisions of this order;

2. Furnish to the Federal Trade Commission copies of such records which are requested by any of its duly authorized representatives;

3. Grant any duly authorized representative of the Federal Trade Commission access to all such business records.

VI

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the respondent which may affect compliance obligations arising out of this order.

VII

It is further ordered, That the respondent herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order; and shall in addition, on or before each of the subsequent two anniversary dates of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order in the preceding year.

IN THE MATTER OF

CENTURY 21 COMMODORE PLAZA, INC., ET AL.

Docket 9088. Interlocutory Order, Nov. 15, 1977

Order striking unauthorized pleading from the record.

On September 15, 1977, the Administrative Law Judge assigned to this matter denied Mr. Unterberg's motion to intervene in this matter. On October 19, 1977 the Commission denied Mr. Unterberg's appeal from this decision.

On November 9, 1977 Mr. Unterberg filed a pleading herein styled "Public Interest Amicus and Interested Party Brief Submitted in Opposition to Complaint Counsel's Motion to Stay Proceedings." The Commission's Rules do not authorize this pleading.

It is ordered, That the aforesaid pleading be, and it hereby is, stricken from the record.

IN THE MATTER OF

NATIONAL HOUSEWARES, INC., ET AL. - DOCKET 8733
EMDEKO INTERNATIONAL, INC., ET AL. - DOCKET 8973

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Complaints, March 13, 1967, June 21, 1974 — Final Order, Nov. 18, 1977

This order, among other things, requires a Salt Lake City, Utah distributor of household products to cease engaging in package selling, as it is defined in the order, and to cease encouraging, advising or assisting others to engage in package selling. Additionally, the firm is required to maintain prescribed records for a period of five years.

Appearances

For the Commission: *John M. Porter, Gerald E. Wright* and *Ralph E. Stone.*

For the respondents: *Bierbower & Rockefeller,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that National Housewares, Inc., a corporation, and Easy Pipella, Keith Bigler, David Bigler, Michael Pipella and Edward Gilson, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent National Housewares, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Utah, with its principal office and place of business located at 1260 East Vine St., Salt Lake City, Utah.

Respondents Easy Pipella, Keith Bigler, David Bigler, Michael Pipella and Edward Gilson are officers of said corporation. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Respondent Michael Pipella's business address is 3645 Tenth Ave. South, Great Falls, Montana. Edward Gilson's address is 1624 West Anaheim, Harbor City, California. The address of the other officers is the same as that of the corporate respondent.

[2] PAR. 2. Respondents are now, and for some time last past have

been, engaged in the advertising, offering for sale, sale and distribution of household appliances, books, tools and other merchandise to dealers who in turn resell such items to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said merchandise, when sold, to be shipped from their place of business in the State of Utah and from their suppliers, located in various States of the United States, to their dealers located in various States of the United States and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their said products by the consuming public, respondents supply printed sales presentations and promotional sales materials including brochures, form letters, questionnaires, cards, and other oral and printed information, to said dealers for distribution and for their use in making oral sales presentations, all of which they use, in promoting the sale of said products to the consuming public.

Based on the information and suggested representations and other data contained in the aforesaid sale presentations and promotional sales material, said dealers and their salesmen are enabled to represent, and do represent to their prospective customers, among other things:

1. That the dealers selling respondents' merchandise to the public are conducting surveys and that the prospective customers' names will be entered in a drawing or contest to be held in connection with the surveys.

2. That prospective customers have won prizes in the drawing or contest and must make an appointment with one of the dealers' representatives in order to receive such prizes.

3. That customers are especially selected in order to promote the sale of respondents' products handled by said dealers.

[3] 4. That customers of the aforesaid dealers are receiving reduced prices or a special introductory offer in order to promote the trade names of the merchandise sold by respondents and that savings are thereby afforded to purchasers from respondents' regular prices.

5. That customers making an initial purchase from the aforesaid dealers may thereafter purchase respondents' merchandise at a 50 percent discount from the dealers' regular prices.

6. That when customers purchase one item from the aforesaid

dealers, other items are awarded to such customers as a gift or "at no extra cost" or that they are "free."

PAR. 5. In truth and in fact:

1. The aforesaid dealers are not conducting surveys and the prospective customers' names are not entered in a drawing or contest to be held in connection with said surveys or otherwise. Said dealers are only seeking information about prospective customers' appliance needs and credit ratings which is used as a basis to determine whether an attempt shall be made to sell such customers merchandise.

2. Persons do not win prizes at drawings or any other type of contest but are so notified because such persons appear to be good prospects for the sale of merchandise and this means is used to induce prospective customers to make an appointment with one of the dealers' sales representatives.

3. The aforesaid dealers' customers are not especially selected. On the contrary, said merchandise is available to anyone with the money or credit rating to take advantage of it.

4. Customers of the aforesaid dealers do not receive reduced prices or a special introductory offer but are offered the same prices at which said dealers sold respondents' merchandise in the past and savings are not thereby afforded to such purchasers.

5. Customers making purchases from the aforesaid dealers will not thereafter be able to buy merchandise at a 50 percent or any other substantial discount from dealers' regular prices.

[4] 6. Customers of the aforesaid dealers do not receive merchandise as a gift or "at no extra cost" or "free," but the price of any additional items of merchandise is included in the price that such customers pay for the item sold by said dealers, and the item required to be purchased has never been sold separately in substantial quantities at such prices.

Therefore, the statements and representations set forth in Paragraph Four hereof are false, misleading and deceptive.

PAR. 6. In the course and conduct of their business as aforesaid, and for the purpose of inducing the purchase of their merchandise by the consuming public, said respondents supply the dealers who handle their merchandise with leaflets and other data containing retail pricing representations.

Typical and illustrative of the aforesaid representations are the following:

WALTHAM
Sea Fall

Value $69.50		Picture of the watch
* * * * * * *		
Air - way Sanitizor 88 Value $259.85		Picture of the assembled machine and the separate parts
* * * * * * *		
[5] 7 inch HEAVY DUTY POWER SAW	Picture of saw	Value $59.50

PAR. 7. Through the use of the aforesaid representations, and others similar thereto but not specifically set forth herein, and for the purpose of effecting their retail pricing policy, respondents have represented and placed in the hands of said dealers the means and instrumentalities for representing, directly or indirectly, that said stated prices, accompanied by the word "VALUE" are not appreciably in excess of the highest prices at which substantial sales of such merchandise have been made in the recent regular course of business in the trade area where such representations are made.

PAR. 8. In truth and in fact:

The aforesaid stated prices accompanied by the word "VALUE" are appreciably in excess of the highest prices at which substantial sales of such merchandise have been made in the recent regular course of business in the trade area where such representations are made.

Therefore, the statements and representations set forth in Paragraphs Six and Seven hereof were and are false, misleading and deceptive.

PAR. 9. By reason of the aforesaid practices respondents place in the hands of others means and instrumentalities by and through which they may mislead and deceive the public as to the prices, methods of sale and other practices followed in offering for sale and in selling their said merchandise.

PAR. 10. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of

products of the same general kind and nature as those sold by respondents.

[6] PAR. 11. The use by the respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' appliances, books and other merchandise.

PAR. 12. The aforementioned acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Emdeko International, Inc., a corporation, and Anthony J. Wanlass, individually and as an officer of said corporation, hereinafter referred to as "respondents," have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Emdeko International, Inc. is a Utah corporation, with its principal office at 1260 East Vine St., Salt Lake City, Utah. Respondent Emdeko International, Inc. wholly owns National Housewares, Inc. (hereinafter referred to as "National"), a Utah corporation, with its principal office at 1260 East Vine St., Salt Lake City, Utah. Emdeko International, Inc. dominates and/or controls the acts and practices of National, and its distributors. Respondent Anthony J. Wanlass is an individual and an officer of said corporation. He formulates, directs, and controls, the acts and practices hereinafter set forth. Respondent Anthony J. Wanlass' address is the same as that of Emdeko International, Inc.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of household appliances, books, tools, firearms, alarm systems, and other products. In the course and conduct of its business, National has entered into oral or written distributor agreements with various firms and individuals (hereinafter referred

to as "distributors") whereby such distributors agree to purchase respondents' "Emdeko" brand products and to sell such products, directly or through representatives they engage, to consumers.

[2] National, directly and through supervisory employees and representatives, and through said distributors [acts and practices of "distributors," referred to hereinafter, include the acts and practices of dealers, franchisees, licensees, employees, salesmen, agents, solicitors, independent contractors, or other representatives engaged by said distributors], places into operation and, through various direct and indirect means and devices, controls, directs, encourages, facilitates and implements the following sales methods:

(a) Consumers are contacted by telephone calls and/or mail, and by means of statements, representations, acts and practices as hereinafter set forth, are induced to visit the places of business of said distributors.

(b) Consumers, while visiting such places of business, by means of statements, representations, acts and practices as hereinafter set forth, are induced to attend sales presentations conducted by said distributors.

(c) Consumers, during said sales presentations, by means of statements, representations, acts and practices as hereinafter set forth, are encouraged and cajoled to sign contracts obligating themselves to spend substantial sums of money to purchase said "Emdeko" brand products which have been purchased by said distributors from National.

National possesses the inherent authority to control the acts, practices and policies of its distributors, and/or does control, encourage, facilitate, implement and furnish the means, instrumentalities, services and facilities for, and condones, approves, and accepts the pecuniary and other benefits flowing from, the acts, practices and policies elsewhere herein set forth, of said distributors, and is thereby responsible for the acts and practices of said distributors.

PAR. 3. In the course and conduct of its business, National now causes, and for some time last past has caused its said products, when sold, to be shipped from its place of business in the State of Utah and from its suppliers, located in various States of the United States, and in foreign nations, to its distributors located in various States of the United States, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business as aforesaid,

and for the purpose of inducing consumers to sign sales contracts, National's distributors utilize or display [3] sales promotional materials and utilize sales promotional practices or other means and instrumentalities, controlled and directed, encouraged, furnished, approved, condoned and/or ratified by National. In conjunction therewith, National's distributors have made the following oral and written statements and representations:

(a) That their offers are being made to specially selected persons;

(b) That they are conducting a survey or gathering marketing information;

(c) That a consumer is unqualifiedly entitled to a prize or gift;

(d) That there is a reasonable basis from which to conclude that consumers making an initial purchase from National's distributors will thereafter be able to buy merchandise from such distributor or from other distributors at a substantial discount from such distributor's regular prices;

(e) That there is a reasonable basis from which to conclude that customers of National's distributors are receiving reduced prices in that:

(1) National's distributors are making a special introductory offer;

(2) savings are afforded to purchasers buying more than one product, by comparison with what National's distributors' prices for products would be if purchased singly;

(3) savings are afforded to purchasers by comparison with recent actual selling prices at which products of similar grade and quality were sold by competitors.

PAR. 5. In truth and in fact:

(a) National's distributors' said offers were not being made only to specially selected persons, but to the contrary, were made to numerous members of the general public through frequent solicitations of broad segments thereof.

(b) National's distributors' principal purpose in contacting consumers is not to conduct a survey or gather marketing information. Said distributors' principal purpose is to obtain information about the potential for selling prospective customers products sold by National, and about prospective customers' credit worthiness, which information is used as a basis to determine whether an attempt shall be made to sell such prospective customers products sold by National.

[4] (c) Consumers are not unqualifiedly entitled to a prize or gift; National's distributors frequently do not tender such prize or gift if they do not believe they have a reasonable probability of selling a substantial dollar amount of National's products to a prospective

customer; or, if at the time the prospective customer arrives at National's distributors' place of business to obtain the prize or gift, such consumer does not permit such distributor to make a sales presentation.

(d) National and/or its distributors, have no reasonable basis from which to conclude that consumers making an initial purchase from National's distributors will thereafter be able to buy merchandise from such distributor or from other distributors at a substantial discount from such distributor's regular prices. The only reasonable basis for such representation would be the existence at the time such representation was made, of an operating program whereby prior purchasers may purchase products from National and/or its distributors at a savings or discount, National and/or its distributors having established the validity of such savings or discount representation by competent and reliable statistical evidence obtained prior to making such representation.

(e) National and/or its distributors have no reasonable basis from which to conclude that customers to National's distributors are receiving reduced prices in that:

(1) National's distributors are making a special introductory offer;

(2) savings are afforded to purchasers buying more than one product, by comparison with what National's distributors' prices for products would be if purchased singly;

(3) savings are afforded to purchasers, by comparison with recent actual selling prices at which products of similar grade and quality were sold by competitors.

The only reasonable basis for such representations would be competent and reliable statistical evidence obtained prior to making such representations.

Therefore, the aforesaid statements, representations, acts and practices were, and are, unfair, false, misleading and deceptive.

PAR. 6. For the purpose of inducing consumers to purchase respondents' products, National's distributors induce consumers to visit such distributors' places of business by means of mail and telephone solicitations. Consumers are not clearly [5] informed in such solicitations that the principal purpose of National's distributors in making such solicitation is to arrange a sales presentation. Consumers who visit National's distributors' places of business in response to such solicitations are subjected to lengthy, intense, and emotional sales pressure, including requests by National's distributors that consumers, in connection with an advertising program, make choices among, and state opinions about, National's products. Consumers are not clearly informed, either prior to or during the

body of such sales attempt, that National's distributor's principal purpose in meeting with said consumers and soliciting said choices and opinions is to make a sales presentation. Consumers are insistently urged, cajoled, and coerced to purchase a number of National's products. Consumers are not afforded a reasonable opportunity to consider and comprehend the representations made to them by said distributors, their need for National's products, or the value of National's products in comparison with competing products.

Sales are typically consummated by means of an installment sales contract, involving a minimum downpayment, a cash sales price frequently in excess of $500.00, and substantial interest and other charges. Consumers frequently do not appreciate the extent of their obligation under said contract, in view of the minimum cash downpayment required, and the relatively low monthly payments they agree to make.

Therefore, the aforesaid statements, representations, acts and practices were, and are, unfair, false, misleading and deceptive.

PAR. 7. Nationals' distributors in a substantial number of instances and in the usual course of their business, sell and transfer their customers' obligations, procured by the aforesaid unfair, false, misleading and deceptive means, to various financial institutions. In subsequent legal actions to collect on such obligations, these financial institutions or other third parties, as a general rule, have available and can interpose various defenses which may cut off certain valid claims customers may have against said distributors for failure to perform or for certain other unfair, false, misleading or deceptive acts and practices, and such facts have not been disclosed to customers.

Therefore, the aforesaid acts and practices, were, and are, unfair and deceptive.

PAR. 8. The use by National and its distributors of the aforesaid unfair and false, misleading and deceptive statements, representations and practices, and their failure to disclose material facts, as aforesaid, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and complete, and into the purchase of [6] substantial quantities of said products by reason of said erroneous and mistaken beliefs and unfairly into the assumption of debts and obligations and the payment of monies which they might otherwise not have done, and under conditions which are unfair to such persons.

PAR. 9. The aforesaid acts and practices of respondents, as herein

alleged, were, and are, all to the prejudice and injury of the public and constituted, and now constitute, unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

Commissioner Thompson dissenting.

Initial Decision by Lewis F. Parker, Administrative Law Judge

November 30, 1976

I. PRELIMINARY STATEMENT

A. *History of the Proceedings*

These proceedings began on June 21, 1974 with the issuance of an order directing the respondents National Housewares, Inc. ("National") and Edward Gilson to show cause why the Commission should not reopen the proceeding in Dkt. 8733 and alter and modify a 1968 consent order [2] so that it would read as provided in the form of order contained in an attached proposed modified complaint. National and Mr. Gilson opposed the order to show cause, but in a December 3, 1974 order overruling respondents' opposition, the Commission reopened the proceeding and directed expeditious hearings to determine if its 1968 consent order should be altered or modified to encompass the practices alleged as illegal in the proposed modified complaint and order.

On the day it issued its order to show cause, the Commission also issued a complaint in a related matter, *Emdeko International, Inc., et al.*, Dkt. 8973 ("Emdeko"). Thereafter, complaint counsel asked that the National and Emdeko proceedings be consolidated, but the Commission refused to do so in its December 3 order.

Respondents in the *National* proceeding filed their answer to the order to show cause on August 2, 1974 and denied most of its allegations. Respondents in the *Emdeko* proceeding filed their answer to the complaint on the same date, denying most of its allegations.

I was assigned to both of these proceedings on February 5, 1975 and, on February 19, 1975, issued an order consolidating the *National* and *Emdeko* proceedings for the receipt of evidence. Prehearing conferences were held in the consolidated proceedings on March 18, May 16 and August 6, 1975, and during this time both complaint counsel and respondents were engaged in discovery. Because the Commission ordered the *National* proceeding to be tried expeditiously, hearings for the presentation of evidence by complaint

counsel were scheduled to begin on September 22, 1975, before respondents completed their discovery. It was my intention to require respondents to present their defense after complaint counsel had rested their case and respondents had completed their discovery. However, circumstances forced me to cancel these hearings; instead, hearings for a limited purpose—to permit the introduction into evidence of certain Commission exhibits—were held in Washington, D.C. on October 14, 15 and 16, 1975. Thereafter, respondents completed their discovery and hearings for the reception of complaint counsel's evidence began in San Francisco, California on April 19, 1976 and continued until April 30. There was a short recess and hearings were then held in Washington, D.C. from May 5-7 and on May 10, 1976. After another recess, respondents presented their defense from June 8-10 in Salt Lake City, Utah and from June 22-24 in San Francisco, California.

[3] Complaint counsel asked for rebuttal hearings but in an order dated August 4, 1976, I confirmed an oral ruling made during defense hearings that they could not present rebuttal testimony or documents because such evidence was irrelevant to the scope of the order, the purpose for which complaint counsel would have offered it. I did, however, permit complaint counsel to submit an offer of proof.

The record for the receipt of evidence was closed on August 13, 1976. Complaint counsel and respondents filed their proposed findings of fact and conclusions of law on September 28, 1976; replied were filed on October 19, 1976.

B. *The Allegations of the Complaints*

Aside from descriptions of the respondents and their relationship with one another, the allegations of the proposed modified complaint in *National* and the *Emdeko* complaint are essentially identical. The complaints allege that respondents sell "Emdeko" brand products to distributors who, in turn, sell those products to consumers and that respondents directly through their employees and through their distributors place into operation and, through various direct and indirect means, control, direct, encourage, facilitate and implement a sales method in which consumers are induced to visit the distributors' places of business, to attend sales presentations conducted by the distributors and to spend substantial sums of money to purchase Emdeko brand products which the distributors have purchased from respondents.

The complaints claim that because of respondents' inherent authority to control their distributors, their actual control over the

distributors, their encouragement and approval of the distributors' practices, and their receipt of pecuniary benefits from those practices, respondents are responsible for the following false and misleading representations of distributors:

1. That their offers are being made to specially selected persons.

2. That they are conducting a survey or gathering marketing information.

3. That a consumer is unqualifiedly entitled to a prize or gift. [4]

4. That there is a reasonable basis from which to conclude that consumers making an initial purchase from National's distributors will thereafter be able to buy merchandise from that distributor or other distributors at a substantial discount from that distributor's regular prices.

5. That there is a reasonable basis from which to conclude that customers or respondents' distributors are receiving reduced prices in that:

a. Respondents' distributors are making a special introductory offer.

b. Savings are afforded to purchasers buying more than one product by comparison with what respondents' distributors' prices for products would be if purchased singly.

c. Savings are afforded to purchasers by comparison with recent actual selling prices at which products of similar grade and quality were sold by competitors.

The complaints also allege that distributors' customers are not informed during mail or telephone solicitations or during the body of the sales presentation that the distributors' principal purpose in meeting with consumers is to make a sales presentation, that the sales presentations are lengthy, intense and emotional, that customers do not realize the extent of their monetary obligation when they sign installment sales contracts and are not informed that their obligations are transferred to financial institutions.

The proposed orders would require respondents, either directly or through distributors, to cease and desist from making the representations which the complaints allege are false, misleading and deceptive. In addition, it would require respondents to deliver a copy of the order to its distributors, to conduct a surveillance program to determine whether its distributors are complying with the order and to cease permanently from dealing with any distributor who violates the order two or more times within 180 days.

[5] The following findings of fact, conclusions of law and order are based upon the proposed findings filed by complaint counsel and respondents and the replies thereto. Proposed findings not adopted

herein verbatim or in substance are rejected as not supported by the evidence or as immaterial.

II. FINDINGS OF FACT

A. *Description of the Corporate and Individual Respondents*

1. Respondent Emdeko International, Inc. ("Emdeko") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Utah, with its principal place of business located at 1260 East Vine St., Salt Lake City, Utah (Ans., D. 8973, Par. 2).[1]

2. Respondent National Housewares, Inc. ("National") was formerly a corporation organized, existing and doing business under and by virtue of the laws of the State of Utah (CX 1A) and was a wholly-owned subsidiary of Emdeko, which owned 100 percent of the issued and outstanding stock of National (Resp. Adm. No. 40).

3. On December 31, 1969, National was merged into Emdeko, which became the surviving corporation (Resp. Adm. No. 38; Tr. 2136). Since that time, National has operated as an internal division of Emdeko (Ans., D. 8733, Par. 1).

4. Respondent Anthony J. Wanlass has been a vice-president of National since January 16, 1969 (Resp. Adm. No. 34), has been a vice-president of Emdeko since January 1, 1970 and has been a member of its board of directors since February 16, 1972 (Resp. Adm. Nos. 31, 32). He was also a national area director for the western division of National in 1970 and 1971 (Resp. Adm. No. 41), is an officer of a number of Emdeko's subsidiaries, and is a minor owner of Emdeko stock (0.6 percent) (CX's 1, 460B).

[6] 5. Respondent Edward Gilson became a vice-president of Emdeko and a member of its board of directors on February 26, 1970. He is now the president of Emdeko (Resp. Adm. Nos. 27, 28). He is also an officer in several of Emdeko's divisions and subsidiaries (CX 1) and has owned between 13 percent and 17 percent of the stock of National and Emdeko during the past several years (Tr. 2131; CX's 459, and Emdeko during the past several years (Tr. 2131; CX's 459, 460).

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[1] Abbreviations used in this decision are:
CX - Commission's exhibits.
RX - Respondents' exhibits.
Tr. - Transcript of testimony.
CPF - Complaint counsel's proposed findings.
RPF - Respondents' proposed findings.
Ans. - Answer.
Adm. - Admissions (CX's 545-550).

B. *The Nature of Respondents' Business*

6. Emdeko, through several divisions and subsidiaries, is engaged in the manufacture, purchase, distribution and financing of consumer products (CX 1):

a. Manufacturing subsidiaries:

Name	*Product*
Casady Engineering Corp.	Automobile stabilizers, fire alarms, floor polishers, burglar alarms (Tr. 1982).
P. O. Ackley Co.	Firearms (assets liquidated) (Tr. 672).

b. Purchasing subsidiary:

Jet Star Industries (50 percent owned (Tr. 674-75)).	Sewing machines, movie cameras, cameras, radios, gift items (Tr. 675).

c. Distributing divisions:

National Housewares, Inc.	Sells products[2] under the Emdeko label to distributors who resell to consumers.
Appliance Showcase	Sells Emdeko, Speed Queen and Admiral appliances to consumers (Tr. 2319-20).

[7] d. Consumer finance division and subsidiary:

Spartan Acceptance Corp.	Finance company which purchases consumer installment contracts (Tr. 824-25, 881-82, 1629-30); CX's 216, 227).

[2] A complete list of which is contained in CX 2A-B. Some of the products sold are: Fire and burglar alarms, movie cameras, china, cookware, lawn mowers, sewing machines, stereos, vacuum cleaners, bicycles, flatware, luggage, power tools, tool kits, cutlery, rifles, and watches.

Olympic Agency, Inc.	Collection agency which handled delinquent accounts referred by Spartan Acceptance. Now inactive (Tr. 583, 2130).

C. *Commerce*

7. In the years 1971 and 1972, National shipped 331,260 product units and 18,692 product cases (CX 3) from its places of business in Utah and other states to distributors (CX's 4-5) located in various States of the United States. Emdeko also sells through Casady Engineering Corp. to J. C. Penney Co., U.S. Safety and Engineering Co., and others who in turn sell to consumers located in various States of the United States (Tr. 1982). National has transmitted contracts, promotional material, and other business papers from its place of business in Utah to distributors located in various States of the United States, and has received contracts, letters, checks and/or other written communications and oral communications from distributors in the several states. (See, *e.g.*, CX's 7, 8, 10, 11, 14 through 25, 345 and 347 through 349, which were disseminated in 1971 and 1972 by National to its distributors (Joint Response to Amended Request for Admissions, dated August 20, 1975; CX 550, CX's 237; 445 at p. 3; 455 at pp. 7 and 19; 518; Tr. 769, 1609, 1952-53, 2056, 2084, 2279); see also, CX's 30, 33, 40, 57, 70, 101, 175, 178) (for examples of correspondence from distributors to National, see CX's 43, 54 and 203)). Officers of National and area directors have personally travelled from their offices in Utah to the business offices of distributors located in the various states (Tr. 500, 777-78, 787, 1455, 1577, 1674, 1849-50, 1859, 1949, 2064, 2067; CX's 31A, 32A, 34, 39) and distributors have travelled to various locations for meetings with officers of National, area directors and distributors (Tr. 1574, 1576-78, 1584-85, 2143-44; CX's 93, 97, 121 and 128). [8]

D. *National's Relationship with Distributors*

(1) Distributors' Use of the Emdeko Trademark

8. Distributors who purchase products from National are permitted to use the Emdeko trademark in their own businesses (Tr. 2255; CX's 4, 5, 364) and do so by displaying it in their offices (Tr. 2255; CX's 447A, 524), by showing motion pictures which describe Emdeko products (Tr. 798, 1058, 1152, 1165, 1180-81, 1201, 1249, 1396, 1472,

1485, 1696, 1728, 1846, 2050), and by selling products with the Emdeko label (Tr. 549).

(2) Ownership or Other Interest in Distributors

9. The relationship between National and distributors is unwritten, informal and is terminable at will by either National or the distributors (Tr. 469-70, 553-55, 593, 699-700, 789, 1456, 1643, 2058).[3]

10. With the exception of the distributorship of Mr. Jerry Smith (RPF, p. 22), neither National nor any of its principals own the stock of or have any other financial interest in distributors who testified in this proceeding (Tr. 484, 776, 1439, 1664, 1832, 1909). In 1968, Mr. Smith severed his relationship with the respondents by buying out the interests of National's principals in his distributorship (Tr. 560-61).

11. National has no financial interest in distributors' leases for office space (Tr. 484, 782, 1832, 1910), does not own the assets of any distributors (Tr. 776, 901-02, 1439, 1832, 1908-09, 2259), does not hold the mortgage on property owned by distributors (Tr. 782), has not paid any obligations owed by the distributors (Tr. 790, 901-02, 1465, 1677, 1883, 1908-09, 2271) and none of its principals are members of the boards of incorporated distributors (Tr. 776).

[9] 12. After products are sold to a distributor, National retains no title to nor interest in them and distributors cannot return them to National except for the usual repairs covered by warranties (Tr. 1458, 1665, 1860, 1961, 2069; CX 351, p. 16; RX 34B).

(3) Distributors' Purchases from National

13. Although one distributor has made substantial purchases from sources other than National ($60,784 in 1974, Tr. 432-33, 448) and others do not rely exclusively on National for their inventory (Tr. 1013, 1442, 1648, 1796, 1912-13, 2042, 2260, 2288, 2308), most distributors rely heavily on National for products which they resell to their customers (CX's 495, 511, 521; Tr. 1858, 2084, 2288).

14. In turn, most of National's income depends upon its sales to distributors (Tr. 698). At one time (in 1970), National sold its products to some 200 distributors located throughout the United States. In that year, National's annual sales were approximately $15,000,000. Since then, the number of distributors to whom

[3] Since National is a division of Emdeko, the activities described in this decision are also attributable to Emdeko. Distributors referred to herein, unless that term is otherwise explained, are those who purchase products from National for resale to consumers and who have received advice from National about business operations and selling techniques.

National sells its products has declined dramatically—to 34 in early 1976 (Tr. 557, 698).

(4) Business Advice and Assistance to Distributors

15. At the beginning of its relationship with new distributors, National provides them with several publications which aid them in their future operations. These include distributor information manuals giving detailed advice on leasing and furnishing the sales office, hiring and training office personnel and salesmen, and other matters of interest to an inexperienced distributor, including suggestions on attracting prospects to their showrooms ("lead materials") (CX's 350 and 351), and authorized marketing manuals and "Derby Winner" tapes which give detailed advice on sales presentations (CX's 17-20, 367, 454, 553-56). Two of these (CX's 367, 454) furnish "scripts" which National recommends that distributors' salesmen read verbatim during the sales presentation (CX 350, p. 77). These materials were disseminated to distributors (CX 527, which lists them among sales aids available to distributors; CX's 549-50, 553-56; Tr. 397, 436, 769, 771, 821, 831-32, 955, 1333-35, 1427, 1448, 1609, 1842, 1898, 1952-53, 2056, 2080, 2267-68, 2270). Distributors using the Emdeko label are the only customers to whom National furnishes detailed business advice and assistance. Emdeko's Casady Engineering division manufactures certain products (smoke and heat detectors, air purifiers, floor care machines and auto stabilizers) which it sells to Emdeko [10] distributors and to private label customers such as U.S. Safety and Engineering (Tr. 588-89, 1982) and J. C. Penney, but Casady provides U.S. Safety only with technical and product information, not suggested lead materials or sales presentations (Tr. 1984-85, 2004, 2026-27).

16. National has had several "area directors" who call on distributors to motivate them to increase their sales and to give them administrative advice (Tr. 1358-59, 1564-67, 2067). National has also conducted national sales conventions and regional workshops at which distributors have exchanged ideas about attracting customers through lead systems and making sales presentations to them (CX's 236, 538; Tr. 788, 1358-60, 1437-38, 1478-79, 1578-80, 1595, 2061).

17. Area directors do not visit distributors frequently (Tr. 468, 777-78, 1565, 1647, 1852, 2066-67, 2259), but when they do, they report to National the lead systems[4] used and any problems which distributors might have (Tr. 2093-98). They also listen to distributors' sales presentations (Tr. 1564-67, 1674, 1689, 2090). Other duties

[4] See Finding 26.

include assisting distributors to find a financing source (CX 8, p. 1), gathering lead systems from successful distributors and giving them to other distributors (Tr. 454-55; CX 487A), and getting distributors to discuss sales presentations at conventions (Tr. 1358-60).

18. Mr. Wanlass, National's national sales director (Tr. 551), has conducted a series of motivational and instructional "workshops" for distributors (CX 349B). In 1972, workshops for distributors were held in Dallas, Chicago, Atlanta, Philadelphia and San Francisco (CX 349B). Mr. Wanlass participated in these and other meetings where lead systems and suggested sales presentations were discussed (CX's 93, 97, 121, 128, 171, 175, 538; Tr. 788, 1437, 1443-44, 1579-80, 1856, 1894-96, 2061). He also participated in the "Derby Tapes" described below (see Finding 38).

19. Mr. Gilson, president of National (CX 1, Adm. No. 30), also attended regional meetings and conventions at which lead systems and sales presentations were discussed [11] (CX's 93, 97, 121, 128, 175, 344, p. 13, 349B; Tr. 1595, 2144-45). He has assisted distributors in arranging for the purchase of their installment contracts by finance companies (CX's 31A, 32A, 36, 37, 40, 51, 68, 130, 182; Tr. 2140, 2169) and has visited distributors, offering advice about personnel matters, lead systems and sales presentations (CX's 31B, 32A, 39, 46, 48, 69A; Tr. 837, 857, 866-67). He also participated in the "Derby Tapes" which are described below.

20. Although National's area directors and principal officers visit distributors and offer advice and encouragement, they do not participate in or direct the day-to-day business activities of the distributors. They do not help distributors physically set up new offices (Tr. 1675, 1949, 2073), do not make sales presentations to distributors' customers (Tr. 1850, 1949, 2072-73), do not require distributors to use particular lead systems or sales presentations (Tr. 2070-71), do not impose sales quotas on distributors, limit their sales territories or help distributors recruit personnel (Tr. 1638, 1648, 1676).

21. Its distributors do not believe that National has any authority to control their business activities and act accordingly. For example, distributors who sold their businesses did not ask National's permission to do so (Tr. 1564, 1626-27, 1836, 1910-11, 2041) and distributors who opened new offices did not believe they were required to get Emdeko's permission (Tr. 1837). Distributors retain their own accountants and keep their own inventory control records (Tr. 474, 783, 904, 1458, 1673, 1872, 1958, 2269), handle legal problems personally or through their own attorneys (Tr. 475, 783, 904, 1458, 1872, 1958, 2269) and pay for National's products by cash or cashier's

check (Tr. 458, 783, 904, 947-48, 1457, 1665, 1860, 1957, 2052, 2060, 2270; CX 351, p. 16). National does not guarantee or protect the financial obligations of distributors (Tr. 473, 782, 905-06, 1457, 1668, 1861, 1941-42, 2059; RX 41C).

22. On occasion, National's officers have interceded in disputes between distributors and their customers. Sometimes, distributors heed National's pointed suggestions, but not because they feel obliged to do so. Mr. Owens testified concerning a letter from National relating to a complaint (CX 290) that it did not influence him because "I don't need National or anybody else to direct me to what is right or wrong" (Tr. 787). Mr. Smith cleaned [12] his office after Mr. Wanlass complained (CX 133) but he viewed this as a suggestion, not a threat (Tr. 2076). Mr. Merrill testified that he was never threatened by National for failing to follow through on a complaint (Tr. 1460).

23. Although Emdeko's Spartan Acceptance is a potential source of financing for distributors, National does not use it to control distributors' activities. In fact, National has encouraged distributors to develop more than one source of financing (CX 351, p. 19: "Remember this—you can never have too much financing sources") and distributors have not used Spartan to the exclusion of other sources (Tr. 782, 1013, 1452, 1629, 1661).

24. The only testimony which might support the argument that National has exercised some control over distributors' businesses is that of Mr. Earl Pascu who was a distributor in Santa Rosa, California from early 1969 to early 1970 (Tr. 815-16). According to him, he had to mail daily and weekly production reports to National (Tr. 825-28), was required to purchase only Emdeko products (Tr. 829) and was threatened by Mr. Mike Pipella and Mr. Glen Dodd with termination of his distributorship if he did not submit the reports (Tr. 828). Mr. Pascu apparently heeded these warnings. On the other hand, Mr. Pascu did not precisely follow National's suggestions concerning comparative pricing (Tr. 874-75) and conducted much of his business without interference or assistance from National (Tr. 904-08), so that National's alleged control over his business was not as pervasive as complaint counsel claim.

(5) Sales Advice to Distributors

25. The areas in which National has exercised influence over distributors is in the use of so-called "lead systems" to attract customers into their places of business where they are sold "packages" of Emdeko products by the use of suggested selling techniques.

(a) The Lead System

26. National's distributor information manual defines and explains the purpose of the lead system: [13]

> WHAT IS A LEAD SYSTEM?
>
> Certainly, the most important function of this business is securing in volume qualified prospects at a reasonable cost. . . . These are the factors that determine the effectiveness of your lead program; the volume of prospects you have to talk to; the buying potential of those prospects and most important of all your lead cost involved in bringing that prospect to your salesman. The success of your lead system is determined by the number and percent of show from the manufactured appointments. (CX 351, p. 8; see also CX 350, p. 36).

27. The record contains examples of the telephone and mail lead systems used by distributors (CX's 374, 375, 376, 377, 378, 382, 394, 407, 408A, 515, 516, 517, 538, 563, 564, 565). While the systems differ from distributor to distributor, they are simply "variations of one standard system" (National's distributor manual, CX 351, p. 8). These lead systems usually contain the following features:

a. A screening of the buying potential of customers (CX 446A). Distributors do not want to waste a salesman's time on a customer who is unlikely to make a purchase, or who cannot pay for a substantial purchase (*i.e.*, is a poor credit risk) (RX 55, item 11). Thus, the lead system is designed to gather sufficient information about the customer to determine whether the prospect should be invited to the distributorship. A manual disseminated by National to distributors in 1973 listed the following classifications of customers who should be rejected during the lead system phase: Widows (not working), Retired, Laid Off, Bachelors, Widowers (CX 350, p. 42; see also CX 446A; Tr. 460, 802, 1601).

b. An inducement to the customers (usually a husband and wife) to come to the distributors' office at an appointed time. The inducement invariably involves a free gift offer, and sometimes includes reference to an opportunity to enter a sweepstakes upon visiting the office (CX 351, p. 33).

c. A pretext for the distributor's invitation to visit his place of business. The lead systems disseminated by National and used by distributors take into account the [14] fact that few customers would respond to the distributor's invitation to visit his office if they knew that the principal purpose of the visit was to be given a sales presentation.[5] The lead system materials therefore anticipate the

[5] Mr. Wanlass testified about the testing of a lead system which disclosed that a sales presentation would be made. "The results were a great downturn in the number of responses to the invitation and it made setting an appointment for the receptionist afterwards extremely difficult" (Tr. 2297).

customers' natural suspicions by establishing an alternative purpose for the visit—a pretext. The pretext may appear in letter invitation: "a fine gift coming from our company for being one of the families who helped us with our telephone questionnaire" (CX 350, p. 50), ". . .my company gives away sample products under our own brand name. . ." (CX 350, p. 55); or may be used by the distributor's telephone personnel to allay the suspicions of wary customers: "We are marketing to the ———— area our own brand name of indoor and outdoor products called Emdeko. Because of your help with our telephone questionnaire, you folks are entitled to a gift of your choice. . . ." (CX 350, p. 57).

28. One lead system which is contained in National's distributor information manual is the "questionnaire." This system provides for an initial screening telephone call followed by a letter offering an inducement to customers who have "passed" the screening, then a second telephone call making an appointment to visit the distributor's place of business to attend a sales presentation and, in some cases, a third "reminder" telephone call.

29. The suggested statements which should be made in the initial screening telephone call are set forth in the manual (CX 350, pp. 55-56):

> QUESTIONNAIRING METHOD: Hello, Mrs. ————, this is ———— from ————. We are taking a brief questionnaire on our behalf of brand name products in this area. Is your can opener manual or electric? What brand name vacuum do you have? What brand of sewing machine do you have? Does your husband work for a large or a small company? And how many years have you folks been married? Each week our company gives away sample products to families who have helped us with our questionnaire. If your questionnaire card is approved, you will be notified by a SPECIAL LETTER. Be sure [15] to watch for it, as you will need it to receive your gift.
>
> Indicate exact time card is completed.
>
> OR: The following market questionnaire: Hello, Mrs. ————, this is ———— and I'd like to ask you some brief marketing questions on behalf of ————. When purchasing products, do you consider name or mainly quality? Do you prefer door-to-door salesmen or going to the store to purchase your products? Are you in favor of lower product prices? If you don't mind my asking, what is your husband's occupation? And how many years have you folks been married? Each week my company gives away sample products under our own brand name. If your card is approved, you will receive a SPECIAL LETTER in the mail. Please keep it as you will need it to claim your gift. Thank-you.
>
> The second questionnaire, the marketing questionnaire, is only to be used upon the instruction of the distributor. Otherwise, the first one is to be used.
>
> Indicate the exact time, to the fifteen minutes, that the card is completed. NOTE: These are our only questionnaires. No others are to be used. *They work.* Don't let your girls vary from them. Girls, "you will be monitored twice a week, to make sure you are saying the right things. So do it right and we'll make more money." (CX 350, pp. 55, 56).

30. The manual anticipates suspicions that the questions are being asked by a selling organization by providing standardized answers that allay such suspicions:

QUESTIONNAIRE OBJECTIONS AND THEIR ANSWERS:

Questions asked questionnaire girls: What are you doing? What's this all about? What are you up to? What do you need this for? [16]

Answer: We work with 30 different manufacturing companies and right now we are in the process of marketing in this area our own brand name and are finding out the competitive products on the market. And the types of families using them. (CX 350, p. 56).

31. The suggested statements to be made in the inducement phase of the "Questionnaire" lead which follows the telephone screening are set forth in original and follow-up letters illustrated in the manual (CX 350, p. 50):

CONGRATULATIONS:

We are happy to inform you that you have a fine gift coming from our company for being one of the families who helped us with our telephone questionnaire.

Your questionnaire card number listed on the envelope's front has been approved and if you folks will call for an appointment you may come in and select the gift of your choice from many items, such as an electric food warmer, outdoor equipment, cutlery, and many other fine items.

Call our office to arrange a time convenient for you to come in and receive your gift. On weekdays, calls can be made between 9 a.m. and 9 p.m.; Saturdays 9 a.m. to 5 p.m. Please bring this letter with you for verification. Call closest office for your appointment.

* * * * * * *

Friendly Reminder

This is to inform you we are still holding your generous portion of the more than $6,000 in gift Emdeko products to be awarded residents of this area for your help with our telephone questionnaire.

We cannot hold this any longer than 4 days from the date of this postmark. Please call Mr. Green (collect) at 838-8160 to arrange a time to pick up your gift(s).

[17] 32. The gift letter of the "Questionnaire" lead method is designed to elicit a telephone call from customers interested in the gift. The manual suggests that the distributor have appointment girls ready with a standardized talk to establish a firm appointment time for the prospect to hear a sales presentation. However, the method does not contemplate reliance on a voluntary response from customers. The manual recommends that cards be filled out by "questionnaire girls" on customers they have screened (CX 350, p. 55) and to whom letters have been mailed (CX 350, p. 59) and suggests (CX 350, p. 59) that three days after the mailout, the

questionnaire cards be turned over to the appointment girls, who re-telephone the prospect (CX 350, pp. 56-57). The manual sets forth a standardized dialogue to be used in setting up the sales presentation:

> APPOINTMENT METHOD: Hello, Mrs. ————, this is ———— with ————, and I believe you folks received a special letter in the mail. (Pause briefly; but don't wait for an answer). Well, I was calling to arrange a convenient time for you folks to come in and choose your gift. Does your husband work days or evenings? Would (*tomorrow*) or (*next day*) be best? (After time is set say:) Do you have a pen or pencil handy? (Give address and directions.) Fine, we'll see you and your husband (*day*) at (*time*).
>
> OR: Hello, Mrs. ———— this is ———— with ———— and Mr. ———— my manager left a note on my desk asking me to call and arrange a convenient day for you to come in and choose your gift. Would ———— or ———— be best for you? Fine, at 1:30 or 5:00? (After time is set give directions and have them write time down) Fine, we'll see you and your husband at ————.
>
> OR: Hello, Mrs. ————, this is ———— with ————, and I believe you folks received a letter in the mail from us. (Pause briefly.) Well, we have reserved 3:30 or 5:40 tomorrow for you folks to come in to choose your gift, which would be best? (If there is an objection to this particular one at this point, talk to them and arrange a convenient time by using this type of method.) Well, we could probably work you in at [18] ————. Note: In all cases, after you have the appointment made, say this: Fine, do you folks know where we are located? Good, we will see you and your husband at ———— on Friday. Be sure to mark that on your calendar (CX 350, p. 57).

33. The manual anticipates customer suspicions during the "appointment call" that they are being asked to a sales presentation and provides standardized answers that allay such suspicions:

> APPOINTMENT OBJECTIONS AND THEIR ANSWERS:
>
> Questions asked the appointment girls: What are you doing? What is this all about? What are you up to?
>
> Answer: We are marketing to the ———— area our own brand name of indoor and outdoor products called Emdeko. Because of your help with our telephone questionnaire, you folks are entitled to a gift of your choice. Would Friday or Saturday be best?
>
> Question: What are you going to try to sell us?
>
> Answer: We do have products to sell, but as your letter says, the gift is free in every way. But we would like your opinion of our products as compared to others available on the market. Would ———— or ———— be best?
>
> Question: Do we have to set a time?
>
> Answer: Yes, you do. It's better than making you wait. So it is for your own convenience that we do set the appointment time.
>
> Objections: I don't think we would be interested. We don't want to be bothered.
>
> Answer: Oh? Don't you want your gift? (Pause) The gifts are very nice and you are under no obligation. We have openings both during the day and night. Which would be best for you? . . .
>
> [19] What do we have to do? What's the gimmick? What do we have to buy?
>
> Answer: When you folks come in, we like to get your general opinion of our

products, your likes and dislikes, for quality, etc. And for your time you get to make your selection from 5 very nice gifts. (CX 350, pp. 57-58).

The manual recommends that a further call be made to verify that customers will appear at the appointed time for the sales presentation (CX 350, p. 59) and that if they don't show up, that they be recontacted pursuant to the appointment procedures (CX 350, p. 57).

34. Two alternatives are contained in the distributor information manual, a "direct mail" method and a "Gift-O-Gram" which simulates a telegram. These systems will not be described in detail, for while not identical, the suggested statements in them are similar to those in the "questionnaire" method described in Findings 28-33 above.

35. One statement in the manual's illustration of the "direct mail" system should be mentioned, however, for it reveals the central purpose of all of National's lead systems—to attract customers while at the same time avoiding any suggestion that they will be attending a sales presentation. The manual recommends that after customers call, if it is found that they are "undesirable," that is, widows, retired or laid-off persons, bachelors or widowers, that they be discouraged by immediately revealing that which is hidden from desirable customers—*i.e.*, that a very long sales presentation will be made if they come to the distributor's place of business:

> POLICY ON REJECTS: What to say:
>
> Answer: Did you read you letter over? O.K. Now what we are doing is selling all those products in your letter and we would like you to buy some of them. Would you be in the market for any of those? (Pause, wait for an answer.) Now, it does take about 2 hours of your time to talk to our salesman when you come in.
>
> If they are not interested, say, "What was the number on your envelope? Fine, thank-you and have a nice day." (CX 350, p. 42).

[20] If the "undesirables" still insist on an appointment even after hearing the unvarnished truth, the manual states:

> If they are still interested in coming in, say, "Now, the first opening I have is ———— at ———— (1 month in advance) at (early daytime). What is the number on your envelope? Thank-you for calling." END CONVERSATION (CX 350, p. 42).

(b) The Sales Presentation

36. If the lead system used by a distributor attracts customers to his place of business, they are then given a presentation whose purpose is to sell them a "package" of Emdeko products. This involves the sale of several products, some of high value ("majors") and some of low value ("minors") at one price (Tr. 1622). As early as

1961, the co-founders of National were selling products using the "package" concept (Tr. 544-45, 2132-36). Normally, the total price of the package is substantial and ranges from $400-$800 (Tr. 795, 1349, 2286).

37. The expertise which National has gained over the years in package selling is transmitted to distributors in the form of model sales presentations (CX's 367, 454) and National suggests that distributors' salesmen either memorize or read them to prospects (CX 350, pp. 23-24, 77; CX 8, pp. 39-49).

38. The sales presentation is described in four so-called "Derby Tapes" (CX's 17-20). These tapes contain comments on selling technique by five salesmen who won a nationwide contest sponsored by National. They are narrated by Mr. Wanlass, National's director of sales. Mr. Gilson, National's president, also participated in the sessions recorded on these tapes. Respondents argue that these tapes do not represent National's suggestions as to how sales presentations should be conducted (RPF, pp. 71-73) since they were produced only because some distributors made the suggestion that the views of top salesmen would be of interest to others. It is true that Mr. Wanlass testified that he did not subscribe to some of the suggestions made in these tapes and never approved them for use by distributors (Tr. 642, 722); however, these tapes were disseminated to distributors at a national convention in 1970 (Tr. 640-41) and there is no [21] evidence that National ever informed them that it disapproved of any statements in these tapes. Therefore, I conclude that these tapes do represent National's policy with respect to distributors' sales presentations.

39. As described in the tapes, the typical sales presentation is in five parts:

1. *Introduction* (receptionist greeting—view product display and/or view movie—meet salesman—gift presentation)
2. *Initial Product Selection* (introduce products—ascertain needs—sweepstakes selection set aside—select products for concentrated sales effort)
3. *Product Commitment* (sizzle talks on products selected—obtain consumer opinion/commitments regarding need, value, desirability, using worksheet technique)
4. *Letter Presentation* (show testimonial letters—explain letter pretext for offer — obtain consumer commitment to write testimonial letters)
5. *Close* (convert letter authorization commitment to signature on contract—"Surprise" sweepstakes product added to contract—answer objections, using worksheet—obtain credit information) (CX's 18H, 19E).

40. Early in the presentation, customers are told that in return for the free gift which has been offered by the various lead systems described above, the salesman would like them to comment on products which they might prefer, which product factors appeal to

them and what they believe comparable products might cost (CX 18G-H). The salesman has a "work" or "selection" sheet on which he records the customers' questions and comments (CX's 121C, 358, 371, 442, 502). During this part of the sales presentation, customers are encouraged to estimate high prices for the products they select (Tr. 841-42, 1343-44, 1349) and these estimates are totalled. One of the Derby winners explained that the worksheets are used later in the sales presentation to overcome objections to purchasing products: [22]

> AL - Well, I ask them: "What's there to think about?" . . .and then I throw my work sheet out, and say: "You did say that you needed that sewing machine," and just use whatever they've told me right there on the work sheet, back against them. "Your wife needs this, your home needs this, every home should have these alarms in it. Don't you agree with that? Don't you? So what is there to think about?" And I just come back and give them back the letter offer. . . "so really, there's nothing to think about, so if you'll just okay that form and let me get the products for you.." (CX 20F; CX's 18D, 18I).

41. Later in the presentation, customers are given testimonial letters from prior purchasers of Emdeko products and are asked whether they will write a similar letter about products which they have selected and commented on and will authorize National's use of their letter (CX 367, pp. 15-17). Distributors often use testimonial letter and authorization forms which are provided by National (CX's 24, 25, 549-50, 527D).

42. The work sheet and the letter program are designed, as explained by Mr. Wanlass in the Derby Tapes, to lead to a close:

> These pros feel that from the work sheet part of the presentation on, it is all one big close. . .it just naturally funnels down to an inevitable sale. They're closing all the way through their letter story. They get commitments. . .they bob their heads, they nod. . .they use gestures. . .they make certain that the people understand the importance of the letter program. And let's face it. . .as Lonnie Hill says, "it's the letters that justify the entire deal. Short cut the letters, and the people don't understand it, and they're not gonna buy!" (CX 19A).

43. One of the salesmen explained on the tapes how he used the letters to close the sale: [23]

> ERROL - Well I lay out the letter authorization. I lay the pen over there, ask him to give me written permission to use his letters "cause we don't want to get sued by somebody." He understands he's not signing the contract anyway. . .so I wait for him to sign it. He'll usually sign. 90% of the people I have will sign that because of the way I say it. Now I take that back and I lay that over there. "You have a Texas Driver's License?" Naturally, they hear that so much, everything they do. . .anything . . .go in a store to cash a check, somebody asks them. . .so they go like this. . .just impulse. . .and they pull out their wallet before they know what's going on. And I've got the contract on my desk when he reaches for

his pocket, and I just say "What's your age, George?. . .Address?" "Y'all live over here at 1422?. . .Oh, no. . .1426. . ." I made a mistake intentionally, just to make him start going along with me. Then I say, when I get down to. . .I don't approve credit here, yet though. I fill out, just easy. . .I don't say too much 'cause I want to get the figures in and then I want to say: "Now you want to pay something down on this, right? How much? Fifty?" (I couldn't swing fifty.). . ."What could you swing? . . .twenty? (Okay. . .twenty)." I just fill it in . . ."Let me show you this. . .". . .and I turn the contract around and run through all the figures with him. And then I say: "I need your okay right here, and your wife can okay your okay right there. . .okay?" And by golly. . .he'll take and sign it every time, just about. (CX 20G-H).

44. In addition, the salesman may use the customers' prior selection of a product which they would like to win in the "Sweepstakes" during the close to overcome objections:

TONY – Let's make it crystal clear as to exactly what Errol does. On his Sweepstakes entry he steers them to select a product to be one of the fifty second prize winners, as opposed to selecting cash: "And of all the products that were out there, which would you select?" . . .Once that major item is selected, they congratulate them on that choice. They pull that [24] major brochure out of the stack of majors, and set it on the floor, or in a drawer, and they never talk about it again, until they make the surprise close. They then go to their selection of minors, they get three additional majors. They weigh the minors against the majors and wind up with what looks to be, to the consumer, as a three pack. They run the evaluation and work sheet *only on those three items.* They talk about those three items in the letter story; and then, when they're ready to make a close, they present the total offer, they present a product,. . .ask for a letter commitment. . .present a second product, . . .ask for a letter commitment. . .they present the third product. . . ask for a letter commitment from both husband and wife. . .and then as Errol says: "And I told you I had a surprise for you, didn't I? Well, you also get. . .this sewing machine" or whatever it is. . .That's the only time they've seen it now, since the time of the Sweepstakes. "You get that, too, but we want a letter on it."

It's surprising, it's fun, it erases objections, and its overwhelming to the people who thought they had your offer all figured out. . .right up 'til the moment of truth. And from that point on, they simply ask him to give them the authorization to write letters. Exciting? You bet! It puts the package concept back into the program. Believe me, when you do it right, as Errol says: "You don't need to pitch that product. . .it's just a total surprise, and they will take it!" (CX 20C-D).

45. While the "Derby Tapes" do not suggest that salesmen flatly deny that they are trying to sell products, they recommend that the salesman avoid answering that question if it is posed by their customers. Two of the salesmen made the following comments:

ERROL – . . .Do you ever have people ask. . . "Before we do anything. . .is this going to cost us anything? . . . Am I selecting something that you want me to buy?. . . You want to buy something? . . .Well, what's your first choice, there?"

[25] I just go ahead and forget it. . .I just never answer his question. I think it's more or less just a matter that you don't answer the question, positively. You just really ignore the question.

JOHN - When they ask that question, right there, is where the customer is going to take control or you're going to take control. If you get defensive, he's got control of you. On the other hand, if you turn it around, and make a joke of it, and let him realize how foolish he sounds, you've got control. But that's a point where new salesmen, I think, will lose a presentation. Because that's what happens to him. . . (CX 18E).

46. Messrs. Gilson and Wanlass asked for other comments on evading this question:

EDDIE GILSON - I'd like to get back to that part about questions, before the presentation gets along, because this is where a lot of new men lost their percentages. So maybe we might labor on that for just a few minutes. Go around the table as to how other people would handle that objection. . .no. . .not the worksheet. . .when they sit down. . ."What's this all about?" You want to answer to: "Do I have to buy anything?" "Are you selling anything?". . .Why don't we cover that as an objection? It's the first one that a man will get. . .

TONY - It comes up in the selection. . .it doesn't usually come up in the close.

ERROL - And he asks that, you certainly don't want to tell him. . ."Well, no. . .I'm. . .No!" You don't want to say . . ."well, No. . .we're gonna give it to ya free. . ." or anything like that! You want to still keep him, I think a mystery to him.

JIM - Do you ever say: "I'm not going to ask you to buy anything while you're here tonight?"

ERROL - No. [26]

JIM - Have they ever asked that question?

LONNIE - I've had people say: "Do I have to buy anything?" I say: "Mr. Jones, you're under no obligations while you're in my office."

JOHN - I usually turn it into a joke. If he says: "Do I have to buy anything?" I say. . . "well, just $2,000 worth of merchandise. . .no. . . but. . .no, you don't have to buy anything." And they laugh, and it softens them up and they realize how foolish they sound, too.

LONNIE - If they ask: "Am I selecting this to buy?". .I answer them like Errol does: "What do you want to buy? You want to buy my tie? My coat?"

JOHN - "They're all for sale. .you don't have to buy anything."

LONNIE - "No? . . .Well good, now I can tell you about Emdeko". . .and I go right back to Emdeko.

TONY - How do you handle it, Al?

AL – I do mine basically the same. I do tell them that some people do have our products in their home, and that is what they're here for, and I'm going to explain that to them in just a little bit.

(Comments from Group) – That's good.

JOHN – They know they're for sale, and they know that we're selling them. . .

ERROL – If you tell a guy you're going to sell him, he ain't gonna buy. . .that's for sure (CX 17I-K).

47. Of course, if a sale is to be made, the prospect must be told the real purpose of the presentation, but even at the close the subject is brought up obliquely. Introducing the subject of the close on the "Derby Tapes," Mr. Wanlass stated: [27]

On this tape, the Derby Division Winners discuss their particular closes. . .why they close the way they do. . .how to handle objections. . .what they expect. . .and above all else. . .how they maintain a positive, commanding attitude with the people. Their close is all basically the same, and it may be surprising to know that they all use a silent close, on the assumption that "whoever talks first, loses." Here we go live, with five individuals who amassed 3,187 combined points in ninety days. . .(CX 20A).

48. One method which was enthusiastically endorsed by National is the surprise close,[6] explained by one of the salesmen on the Derby tapes:

ERROL – Yeah. Right after I show them the offer there, and say: "Now, this is what we want you to have in that offer". . .and I get rid of this cause I tell it to them now, and I don't want to show them any money. I point there and say: "That's the offer". . .and I don't say "that's the cost," or that's anything else. They know it's the cost. It's nothing down if that's the way they want to do it. And I say: "Now, first of all what you have is this, but would you write a letter on that? If you had it for thirty to ninety days, could you sit down and write your honest opinion about it?" She'll say "Yeah!" And I say: "Would you have any objections for us to use it like I explained to you?" She'll say "No." I say: "Would you have any objections for her to write a letter like that?" He'll say: "No." And I say: "Fine, then we also want *you* to have the item you selected, there, Joe. Would you have any objections to writing your honest opinion about it after thirty to ninety days?" He'll say: "No." I say: "Fine. Then we want you to have that, too." And I say: "But that's not all, cause the more we send you home with, the happier you're going to be, so I also want to include right along with it . . ." and I go into another one, and I ask her for two, then him, one. I like to ask one then the other, then her, then [28] him, like this. This gets participation all the time. They don't lose interest or anything. Then I go to him and I get another letter, and I say: "Now, and I said to you folks we had a surprise for you, right?" They say "Yeah". . . and I say: "We also want you to have that sewing machine that you wanted, too." That's after I've laid out the other three. This is great.

[6] In a memo to distributors, Mr. Wanlass stated "In the areas where this presentation has been tested extensively, closing percentages are up significantly" (CX 519).

And I say: "I'm just gonna ask you one more time. Do you have any objections for us to use your letters, though?" And they'll say no, and I say: "The main thing is we want to show your letters to other people, and we won't show anybody's letters without their written permission because we don't want to get sued by someone. . .so I need your okay right now for National Housewares, Joe, to use your letters." Then I just shut up. When he starts writing his name . . .

MIKE - Okay. Now let's say there's nothing happening right at this point, now. . .quiet. Now what happens? Quietness. . .What do you do?

ERROL - What do you mean? When I lay that authorization out, if he don't sign and he's just real quiet?

MIKE - Right. What do you do?

ERROL - I don't say nothing. I'll sit there and wait until he says something. Whoever talks first loses. If you ask him anything, or try to sell him any more, you're gonna just blow the deal. The more you talk, the more you're trying to hide. You got nothing to hide. . .you've asked him to sign the letter authorization, and sometimes if I feel like this is gonna be a tough guy, I'll stand up and reach over there and take his hand and put the pen in it. And then, physically, say: "You sign that thing. . .we'll use your letters."

TONY - I hope every representative listening to Errol Schenk, picked up the word: SURPRISE. This particular close brought the house down in Salt Lake! It's exciting. It's the true package concept of merchandising. It's a twist. . .a little psychological twist that can increase your closing percentage. . .(CX 20A-B). [29]

E. *Distributors' Adoption of National's Advice*

(1) Introduction

49. Although National has throughout its relationship with distributors given them advice about the lead systems and selling techniques which they should use, there is little evidence that National has the power to impose its wishes upon distributors. In fact, respondents claim that complaint counsel have not even demonstrated that distributors voluntarily follow National's recommendations to any substantial extent (RPF, pp. 76-78). Analysis of distributor and consumer testimony does not support respondents' claim; instead, it reveals that many distributors use or have used lead systems and sales techniques which conform, not in every detail, but in spirit and purpose to the lead systems and sales techniques developed, endorsed and disseminated by National.

(2) Distributor Testimony

(a) Nu-Way Enterprises

50. Nu-Way Enterprises is a Baltimore, Maryland Emdeko distributor[7] (Tr. 428). Mr. Phillips, its president and owner, testified

[7] The words "Emdeko distributor" are used to indicate that this distributor and others primarily sell products manufactured or distributed by Emdeko, not that they are owned or controlled by Emdeko.

that Nu-Way at one time or another received from National the distributor information manual, the "smile chart" (a lead system device) and the authorized marketing manual (Tr. 433-34; CX's 350, 367). He also received copies of the Derby Winner tapes from National (Tr. 435-37; CX's 17-20) as well as a document which illustrates various lead systems (Tr. 442; CX 538A-LL).

51. Nu-Way's purchases from National in 1972 were substantial; however, it did not rely exclusively on this company for its merchandise. Purchases of $60,872 were made in that year from other sources (CX 525A-B).

52. Mr. Phillips' company does not follow all of the advice contained in National documents. The distributor manual is not observed in great detail (Tr. 449) and the canned sales presentation is not followed in every respect; nevertheless, some portions of the suggested presentation, [30] such as product knowledge and the history of the Emdeko brand name, are read to customers (Tr. 452). Although he read the Derby Tapes when he received them, Mr. Phillips denied that he used them in training salesmen (Tr. 452-53). One of the lead letters illustrated in CX 538A-LL which he received from National was developed by Mr. Phillips and was compiled along with many other distributors' lead systems in that document by Mr. Bern Dayley, a National area director (Tr. 453-55).

53. While Nu-Way may not use National's suggested lead systems and selling techniques precisely as recommended, Mr. Phillips' description of a typical sale reveals a definite relationship to the National model. Customers are contacted by telephone and questions are asked which suggest that a survey is being conducted to determine the market potential for Nu-Way's products. The purpose of the questions is actually to determine whether the customers are married and employed—the only persons with whom Nu-Way wants to deal (Tr. 459-60). Desirable customers then receive a letter invitation, containing a gift envelope, to visit Nu-Way's showroom. When they arrive, customers are asked to view a short five-minute film on the Emdeko story and are invited to inspect Emdeko products in the showroom. If at any time customers refuse to participate in the presentation, they are given the gift promised in the letter (Tr. 461-63).

54. If customers decide to stay, they are introduced to a salesman who gives them their gift and enters them into a national contest (Tr. 464). During the sales presentation, which lasts for approximately one hour and fifteen minutes, they are shown other customers' letters and are asked to participate in the letter program.

55. Although Mr. Phillips claimed that his customers know that

Nu-Way is a sales organization because they are aware that they can't get something for nothing he conceded that "I don't stand up and scream it and shout I am going to try to sell them something" (Tr. 472). Furthermore, he commented that the verbatim disclosure provision in the proposed order[8] would be very detrimental to his business (Tr. 479-80), an indication that his method of [31] selling depends on concealing the fact that Nu-Way's purpose is to sell products.[9]

(b) New Century Enterprises

56. Mr. Kenneth Owens, an employee of Emdeko, is a former Emdeko distributor who operated under the name of New Century Enterprises in Denver, Colorado and Portland, Oregon (Tr. 757-59) from April 1, 1968 to January 1, 1976 (Tr. 775). He invested approximately $84,000 when he first opened in Denver (Tr. 776). Except for gift items, New Century purchased all of its merchandise from Emdeko in 1974 (CX 511A-B; Tr. 774).

57. During the several years it was in business, New Century received publications from National including a smile telephone sheet, which contains suggested procedures for distributors' telephone personnel (Tr. 759-61; CX 7B), a suggested procedure for sales presentations (Tr. 760-61; CX 367), and a "Gift-O-Gram," a simulated telegram for use as a lead (Tr. 760-62).

58. With the exception of the heading and the witness' name, New Century used a lead system which was identical to one recommended by and received from National (Tr. 762-65; CX's 515A-B, 516A-B, 517).

59. During the time he was a distributor, Mr. Owens also received the Derby Winner tapes (Tr. 768; CX's 17-20) and other instructional material from National (Tr. 768-70; CX's 7, 7B-N, 350, 351, 367, 454). However, he threw the Derby Winner tapes away because he did not agree with the selling method described in them, and he used the information manuals (CX's 350-351) only at the beginning of his business (Tr. 772).

60. Before he became the owner of New Century, Mr. Owens was trained in the package method of merchandising by Mr. Bigler, one of National's principals (Tr. 791-93). National's recommended marketing manual (CX 367), whose advice Mr. Owens described as being close to the method taught him by Mr. Bigler, was used verbatim by some of New Century's salesmen (Tr. 797). Although

[8] Paragraph 3, p. 13.

[9] In fact, one of Nu-Way's customers, Mr. Ballenger, testified that he was unaware until late in the sales presentation that its purpose was to sell him Emdeko products (Finding 144).

Mr. Owens [32] apparently added some of his own ideas to sales presentations made by him (Tr. 779-80), New Century did adopt as its own the recommended selling techniques contained in CX 367. Furthermore, although Mr. Owens denied that he subscribed to the statement in the Derby Winner tapes, it is noteworthy that Mr. Ron Banuelos, one of the salesmen who participated in the tapes, worked for New Century for about six or seven months (Tr. 791).

(c) Earl Pascu

61. From early 1969 to early 1970, Mr. Earl Pascu operated an Emdeko distributorship in Santa Rosa, California (Tr. 815-16). Mr. Pascu testified that when he began operating, he was furnished a lead system by National which consisted of a mailout offering a free gift and a follow-up telephone call. Neither in the mailouts nor during the telephone calls were customers informed that a sales presentation would be made if they came to his office (Tr. 818-20; CX 7B).

62. Later, after receiving a warning from law enforcement officials about the first lead system which he used, National furnished Mr. Pascu with another (Tr. 823).

63. Mr. Pascu used National's recommended selling techniques up to a point (Tr. 910; CX 454) but some of his presentation was ad-libbed. His presentation included the showing of brochures of major and minor products, the selection by customers of products which they would like to receive,[10] asking them to place a value on the products then selected (Tr. 836), and asking them to write testimonial letters (Tr. 845-46).[11]

64. Although Mr. Pascu didn't care whether or not customers wrote testimonial letters, he represented that they were a condition which had to be fulfilled before [33] they could take advantage of his offer (Tr. 848), along with another qualification—that they display the products and tell their friends about them (Tr. 849).

65. Mr. Pascu avoided telling his customers that they were attending a sales presentation; instead, he was told by Mr. Pipella, a National principal at the time (Tr. 2029), to say that his company was involved in a promotional campaign (Tr. 849-50).

(d) Century Associates, 20th Century Products

66. Ms. Catherine Maddox, Front Royal, Virginia, applied

[10] In the words of Mr. Pascu:
This purpose was to make these people believe that these products would actually be given to them. (Tr. 833).

[11] The testimonial letter form used by Mr. Pascu (CX 362) was furnished by National (Tr. 846-47).

sometime in 1970 for a position as receptionist with Century Associates of Richmond, Virginia, an Emdeko distributor. Her job during the one month that she worked there was to choose between 120 and 140 names from a city directory and mail letters inviting them to call for an appointment to view products in Century's showroom. The letters also listed several products, one of which the customers were informed they had won (Tr. 1328-30).

67. Ms. Maddox was told that when customers called for an appointment, the words "sales" or "sales representatives" were never to be mentioned (Tr. 1330). Although the invitation letter listed several products, Ms. Maddox testified that only two gifts were ever given by her to customers, either perfume or a carving set (Tr. 1331).

68. Later, in 1973, Ms. Maddox answered an ad for a receptionist which was placed by an Emdeko distributor in Winchester, Virginia. She was hired by this distributor, 20th Century Products, as a salesperson and was given a training manual to memorize by Mr. Milnes, its owner (Tr. 1333, 1336; CX 365).

69. After she memorized the training manual and sat in on a sales presentation, Ms. Maddox began selling (Tr. 1355). During a typical sales presentation (which lasted approximately two to two and one-half hours (Tr. 1351-52)), Ms. Maddox told customers who had been attracted to the 20th Century Showroom[12] that she was going to do three things for them—give them a prize, enter them into a sweepstakes contest and give them a chance to participate [34] in the Emdeko letterwriting program (Tr. 1336). During her presentation, Ms. Maddox told customers that the showroom had been opened to introduce National Housewares before a larger store was opened. She also explained the value of word-of-mouth advertising and asked customers to choose minor products (such as drills and electric can openers) and major products which she would "sizzle" by explaining their outstanding features and comparing their prices with those of competing products (Tr. 1337-39).

70. After customers selected major and minor products and were given an opportunity to look at them in the showroom, a worksheet (CX 371) was filled out, supposedly to apprise National of the product features which they liked or disliked; in reality, during the time Ms. Maddox worked for 20th Century, completed worksheets were thrown away (Tr. 1341-43).

71. Ms. Maddox then explained the importance of the letterwriting program and sought customers' participation by requesting

[12] Undesirable customers, such as retired couples, were not given a presentation if they appeared at the showroom (Tr. 1354).

authorization for use of their letters in an advertising program (Tr. 1344-47; CX 362 (letter form)).

72. After explaining the letterwriting program, Ms. Maddox went into her close by computing the cost of the package selected by the customers (Tr. 1348). During the close, Ms. Maddox implied that participation in the letterwriting program would give the customers a better package.[13]

[35] 73. Another feature of the presentation was insistence that customers accept the offer when it was made and use of a superior to intimidate reluctant prospects by suggesting, for example, that they were too stingy to protect their family by buying a fire alarm (Tr. 1353).

74. If she was asked either before or during the presentation if customers had to buy anything, Ms. Maddox was instructed to reply: "You are under no obligation." She was "never allowed to use the word 'buy' or 'sell.' " It was "You are under no obligation. You will receive a free gift today. . ." (Tr. 1356). Another device which was used to avoid discussing the real purpose of the presentation was:

> Fast talking. You were constantly kept talking so that they didn't really have a chance to ask anything because they didn't – it was going really fast, the whole sales presentation was just blah, blah, blah, word after word, and the whole time you were distracting them with things like National Housewares and Dreamhouse and TV shows and advertising and door-to-door salesmen and things like this. You were constantly talking about something. . . (Tr. 1356-57).

75. Mr. Bern Dayley of National Housewares attended an awards banquet for all of National's eastern division, during which salesmen, including Mr. Marty Hampton of 20th Century, presented their pitches for the benefit of the attending distributors. Mr. Dayley never expressed disapproval of the pitch which was used by 20th Century (Tr. 1358-59).

(e) Cades, Ltd.

76. From July 1968 until February 1976, Cades, Ltd. operated several showrooms in the Chicago, Illinois area (Tr. 1422-23, 1438). Purchases of Cades' merchandise were almost exclusively from National (CX 521). Some of the publications which Cades received from National were a description of the 1974 distributors' convention

[13] Then I would say that that's not all you're going to take home today, if they would write me the letter in 30 days, I would also include—and I would pull out another major product [brochure], say the sewing machine, and they were going "Oh," and I would say, "Now, that really is good, isn't it, Mr. and Mrs. Jones?" and they would say, "Oh, yes," because now they think they're going to get a $400 sewing machine and a thousand dollar set of fire alarm systems [f]or eight hundred and some dollars of $704, whatever; and I would say, "That's not all. I will also include," and then I would go whap, whap, whap with some minor products, and by then, they say, "That is really great," you know, only this for all of this. (Tr. 1350-51).

at which 10 lead systems were discussed (CX 524, pp. 12, 16), the distributor information manual (CX 350, Tr. 1427) and the authorized marketing manual containing a suggested sales presentation (CX 367; Tr. 1428).

[36] 77. Basically, with the exception of minor variations, Cades used the sales presentation suggested by National in CX 367 (Tr. 1429-30) as well as an earlier version of the presentation when it was in effect (CX 454; Tr. 1430). Cades also received transcripts of the Derby Winner tapes (CX's 17-20; Tr. 1432) and used lead systems which were collected by Mr. Bern Dayley and disseminated by National (CX 538; Tr. 1432-37).

78. Although some of the techniques which Cades used may have been adopted by National for dissemination to other distributors (for example, Cades was using the lead letters illustrated in CX 538 before it was published (Tr. 1443)), Mr. Merrill, Cades' owner, undoubtedly developed his techniques on the basis of his prior experience as an Emdeko salesman (which he was before he became a distributor (Tr. 1445)) and his knowledge of the basic format and presentation which was developed by the founding distributors, including Emdeko principals (Tr. 1445-46).

(f) Helton Distributors

79. In 1969 Mr. Stevie Joe Helton began working as a salesman for Mr. John Pennington, a distributor of Emdeko products in Birmingham, Alabama. He was trained to sell, as were all salesmen in the organization (Tr. 1559), by reading verbatim from a national sales manual which was similar to CX 367 (Tr. 1555-58).

80. In May of 1970, Mr. Helton opened his own office in Jackson, Mississippi (Tr. 1560).[14] During the time he operated in Jackson, his salesmen were required to read to their customers the sales presentation provided by National (CX 367; Tr. 1561). From November 1972 until December 1973, Mr. Helton was an area director for National. After having been fired by National because of an austerity program, Mr. Helton opened a retail outlet in Bessemer, Alabama for approximately one year (Tr. 1562-63) and then moved to Pensacola, Florida where he presently operates as an Emdeko distributor under the name of Helton Distributors [37] (Tr. 1586). He still requires his salesmen to read the sales presentation manual furnished by National (Tr. 1569).

81. During the past several years, Mr. Helton has used lead systems similar to those disseminated by National—*i.e.*, the "ques-

[14] This is not unusual. Mr. Wanlass testified that most of National's growth has come from sales to distributors who were former salesmen for other Emdeko distributors (Tr. 559).

tionnaire" (CX 538I) and the "Gift-O-Gram" (CX 538N; Tr. 1597-98). He also uses the so-called "Smile Sheet" (CX 7B), disseminated by National, which is a guide for telephone personnel in answering customers' questions (Tr. 1604-05). In connection with the "Smile Sheet," Mr. Helton testified that telephone personnel, unless they are asked, do not inform customers that a sales presentation will be made. If the question is asked, customers are told that Helton is in the sales business, but that they are under no obligation to buy (Tr. 1606).

82. Mr. Helton also used the distributor manual (CX 350) for his initial lead system and to train telephone personnel who make appointments with customers (Tr. 1607-08).

(g) Greater Southwest Market Makers

83. Mr. Guy Brunetti was the owner of Greater Southwest Market Makers, a distributor of Emdeko products which operated in Dallas, Texas from late 1968 to early 1970 and in West Covina, California from late 1970 to sometime in 1972 (Tr. 1832). Sales in Dallas were approximately $400,000. Sales in West Covina were approximately $150,000 per year (Tr. 1833).

84. Mr. Brunetti invested $8,000 in the showrooms in Dallas. He learned the package business by training with Mr. Roger Holton, a distributor of Emdeko products in Colinei, Texas (Tr. 1834-36). The lead system which Mr. Brunetti used at one time in Dallas was similar to one used by Mr. Pennington, another distributor of Emdeko products (Tr. 1840). He also used, as part of the lead system, a "notice card" which was developed by a distributor in Boston (Tr. 1841). The lead system used initially in West Covina informed customers that they had been chosen to receive a free gift and that a "selected few" would receive a free vacation (CX 46B).

85. Mr. Brunetti used the marketing manual disseminated by National in his sales presentation and trained his salesmen to use the "canned" presentation without deviating from [38] it (CX 454; Tr. 1842-43). Two of Mr. Brunetti's salesmen when he operated in Dallas were Errol Schenk and Alan Rhine, who participated in the Derby Tapes. Mr. Brunetti denied that he trained his salesmen to follow the procedures described in the tapes (Tr. 1866-67) yet he conceded that: "There is no salesmen in this world that is going to come right out and - that is making a sales presentation, that is going to tell you this" (Tr. 1869).

(h) Arizona Safety

86. Mr. Dale Coburn has owned distributorships selling Emdeko products in Charlotte, North Carolina and Albuquerque, New Mexico and presently owns Arizona Safety and Appliance in Phoenix, Arizona (Tr. 1908-09). Mr. Coburn first became involved with National in 1961, when he was employed by Mr. Gilson as a door-to-door salesman; later he became a sub-distributor of National in Los Angeles, California (Tr. 1961-64).

87. Mr. Coburn has used several lead systems. In Charlotte he began using one which he had developed in his freezer food business. When he discovered that this system was not particularly successful, he contacted distributors of Emdeko products in his area and began using a modified "Gift-O-Gram" system (Tr. 1915-16). Presently, he is using a lead system he developed without assistance from National which announces that the customer has been chosen to preview products (Tr. 1917; RX 58). This system was adopted by National, disseminated to other distributors and is in use by some (Tr. 1926; CX 538V).

88. At his present location, telephone personnel arrange appointments with customers, who if they ask whether they have to buy anything, are told: "You are not required to buy anything but we sure hope you find something that you like" (Tr. 1922). Mr. Coburn's salesmen give a gift to each prospect before any sales presentation is made (Tr. 1923).

89. Mr. Coburn does not use the marketing manual in his sales presentation, but as described by him it is similar to the presentation developed by National over the years. Gifts are offered and customers are asked to choose two or three products they would like to have; they are then given an opportunity to inspect the products and are informed that the products are sold in a special way—at [39] a package price (Tr. 1933-34). Although it is apparent that Mr. Coburn prefers to offer a package of products, he will sell products individually (Tr. 1943).

(i) Empack

90. Empack is a distributor of Emdeko products which operates in Tukwilla, Washington. The owner of Empack operated another distributorship, New Method Enterprises, in the Seattle, Washington area from 1965 to 1972 (Tr. 2040-41).

91. While Empack and New Method have used lead systems, they were not developed by National; in fact, the system used by Empack, the "Soup-O-Gram," a variation of the "Gift-O-Gram," was devel-

oped by its owner, Mr. Jerry Smith. This lead system has been copied by other distributors (Tr. 2044-47).

92. The telephone questionnaire which he uses and which has been disseminated to other distributors by National was also developed by Mr. Smith (Tr. 2048-49). The recommended sales presentation manual (CX's 367, 454) is followed during Empack's sales presentation but changes to its explanation of Emdeko's business have been made and some of the questions posed to customers as well as the ending have been changed (Tr. 2053). Furthermore, Empack sells products individually as well as in a package (Tr. 2053).

93. Empack received the Derby Winner tapes and Mr. Smith gave them to his sales manager for study. About 10 days later, Mr. Smith heard the tapes and stopped using them because he found their suggestions objectionable (Tr. 2056-57).

94. The reason why Mr. Smith's sales presentation differs from the one suggested by National is apparently not so much due to any disagreement with the fundamental selling concepts endorsed by National but to the fact that he was ordered by the Washington state attorney general to change it (Tr. 2085).

(j) Albert Hughes Enterprises

95. Mr. Albert Hughes has operated Albert Hughes Enterprises, an Emdeko distributor, for approximately 10 years in the Monterey and Salinas, California area (Tr. [40] 2258). Prior to this, he was a salesman for Dan Bigler, a principal of National (Tr. 2273-75). While he has a showroom, he also visits prospects' homes and will sell either a package of products or single ones.

96. For approximately five years, Mr. Hughes used a mailout to secure appointments with prospects. This mailout, which offered a free gift for the privilege of getting to know the prospects, was developed by Mr. Hughes, not National (Tr. 2263-64). Although he has received a compilation of suggested leads from National (CX 538), Mr. Hughes has not used them (Tr. 2264-65).

97. When customers call his company, they are informed that Albert Hughes Enterprises is a sales organization (Tr. 2265). Although he did receive the Derby Winner tapes, Mr. Hughes did not use any of their suggestions in his business because he was not impressed with them (Tr. 2268) and he apparently does not use National's suggested sales presentation even though he used it when he worked as a salesman for Mr. Bigler (Tr. 2280).

(3) Consumer Testimony

(a) Fuller

98. Mr. Steven A. Fuller, Bemidji, Minnesota, was an employee of the Minnesota attorney general's office from 1971-1973 (Tr. 1054). As part of his duties, he was directed to investigate National, Emdeko and Emdeko distributors operating in Minnesota. Using an invitation received from a distributor called New Markets of Minneapolis, Minnesota,[15] Mr. Fuller and an investigator posing as his wife visited two offices operated by New Markets (Tr. 1055-56).

99. At the beginning of the first visit, the Fullers were greeted by a receptionist who invited them to look at several Emdeko products on display. They were then shown a movie narrated by Audie Murphy, which, according to Mr. Fuller, did not disclose that a sales presentation [41] would be made (Tr. 1057-59). Thereafter, a salesman invited the Fullers into his office and gave them a free set of steak knives and then began a sales presentation taken directly from the manual disseminated by National (Tr. 1060-63; CX 562). Included in the presentation was an invitation to participate in an Emdeko bonus contest (Tr. 1065-66; CX 425A).

100. Since he was familiar with the National sales program prior to visiting New Markets, Mr. Fuller knew that the purpose of the invitation was to sell products, but this fact was not explicitly revealed by the salesman until near the end of his presentation (Tr. 1071). During the presentation, Mr. Fuller asked whether he had to participate in the letterwriting program. The salesman responded that his company wanted letters, but that if Mr. Fuller did not write them, the products would still be sold to him (Tr. 1073).

101. At the conclusion of the presentation, Mr. Fuller asked for an opportunity to consider the salesman's offer for two or three days, but was told the offer was only good for that afternoon and evening (Tr. 1074-75). The presentation which Mr. Fuller attended at the other New Markets office was essentially identical to the first (Tr. 1076).

(b) Pritchard

102. In August 1971, Mrs. Janet Pritchard, Janesville, Wisconsin, received a Gift-O-Gram from a local Emdeko distributor, Horizon Unlimited (Tr. 1148-49; CX 565). A few days later, she received a "final notice" to visit the distributor's office and pick up the free gift

[15] The invitation stated: "You and your spouse are invited to attend the showing of our Emdeko brand name product line now ready for the public. For helping us to establish our product line, you are entitled to receive one of three gifts . . ." (Tr. 1094).

which had been offered in the Gift-O-Gram (Tr. 1150; CX's 566, 567A-B).

103. The Pritchards visited Horizon Unlimited's office approximately four days after receiving their gift reminder. They were invited by the receptionist to inspect products on display which, since they had no price tags, Mrs. Pritchard thought were the prizes offered in the "Gift-O-Gram" (Tr. 1152-53). They were then shown the Audie Murphy film (Finding 99) and were introduced to a salesman who took them to his office. After explaining the various gifts which they might choose from, he gave them a set of steak knives (Tr. 1153).

[42] 104. After entering the Pritchards in the Emdeko sweepstakes contest (Tr. 1154; CX 409A), the salesman went into a sales presentation similar to the one recommended by National, adding an emotional pitch, complete with pictures of burned children, about the Emdeko fire alarm (Tr. 1155-59). The presentation lasted about 1 1/2 hours (Tr. 1174).

105. When Mrs. Pritchard received the Gift-O-Gram, she suspected that there was a catch to the gift offer, but she and her husband attended the presentation because of curiosity (Tr. 1164) and the possibility that Horizon Unlimited was opening a new catalog showroom. Neither the letters they received, the receptionist, nor the salesman informed the Pritchards that a sales presentation would be made (Tr. 1173). This only became conclusively evident to Mrs. Pritchard when the salesman began discussing features of the Emdeko products (Tr. 1162).

(c) Butler

106. Jeanette Butler, a speech and drama teacher from Madison, Wisconsin, received a letter inviting her and her husband to New Markets, Incorporated, the local Emdeko distributor. The letter contained a sealed envelope and stated that the Butlers would receive the free gift indicated inside the envelope if they would visit the distributor and view their products. They made an appointment as requested in the letter (Tr. 1179-80).

107. Immediately after arriving at New Markets, the Butlers were shown a movie narrated by Audie Murphy. At the end of the movie, the receptionist told them that a "counselor" would give them their free gift. The salesman designated as their counselor took them to his office and opened the sealed envelope they had received in the mail. They were told they had won a vacation trip or a comparable item. Mr. and Mrs. Butler chose a carving set after the salesman

explained that very few of the total expenses of a vacation trip were paid for by the certificate (Tr. 1180-81).

108. Mr. and Mrs. Butler started to leave after they received the gift but the salesman said he would like to explain some Emdeko products to them. They felt it would have been impolite to leave so they agreed to stay.

109. With the help of brochures, the salesman asked them to sort out the products they could use, told them [43] he was going to give them a quiz and then graded them on statements made by the Butlers as to how they would use the products they had chosen. He also asked them to estimate the cost of the products they had selected and compared their estimates with the alleged actual value of the products (Tr. 1182-84).

110. The salesman showed them testimonial letters from consumers said to be from the Madison area. The Butlers had not yet been told that this was a sales presentation and Mrs. Butler testified that she felt all she had to do to use the products in their own home was to agree to write similar testimonial letters (Tr. 1185-86).

111. The salesman then offered a total price for the package of products they had selected and suggested monthly payment financing arrangements. For each lower and lower monthly payment offered by the salesman, Mr. and Mrs. Butler stated their reluctance to accept the offer. They were told that they had to decide at that time because it was a one-time offer (Tr. 1186).

112. The salesman's supervisor came in and offered them an even lower monthly payment but the Butlers declined and started to leave, whereupon the salesman yelled something and according to Mrs. Butler ". . .this big 350 pound guy came in the door and he closed the door behind him and he stood there with his arms folded." (Tr. 1186-87). Mr. Butler became irate and, after insisting, he and his wife were allowed to leave.

(d) Bonner

113. In July 1971, Kathleen Bonner, of Middleton, Wisconsin, received a mail solicitation containing a sealed envelope from New Markets, Inc. (Tr. 1200). She and her husband were invited to call for an appointment, visit their office, and receive a free gift.

114. After arriving at New Markets, the Bonners were shown a movie describing how and where Emdeko products were made and then looked at displayed products until a salesman introduced himself and invited them into his office. He opened their sealed envelope and told them they had won a vacation or a small item. Mr.

and Mrs. Bonner chose the vacation and were given a certificate (Tr. 1202, 1212).

[44] 115. The salesman explained that the gift offer was made to them for advertising purposes. He said the company did not advertise on television or in magazines but they sent products home with people to establish word-of-mouth advertising (Tr. 1202).

116. The salesman went through a brochure presentation and asked the Bonners to separate the products pictured into groups of needed items. He asked them to estimate the value of each separate product they had chosen and he corrected them if their estimates were lower than what he said similar name brand products would cost (Tr. 1204).

117. The salesman told them they would be tested to determine whether they were qualified to take the products home and said the company needed to know what kinds of statements they would put in testimonial letters which they would have to write before they could take any products home.

118. The salesman then gave them a package price for the products they had selected. Mr. and Mrs. Bonner did not know until this time that this was a sales presentation. Mrs. Bonner testified that she thought they had been chosen as a testing family (Tr. 1205-06). Nonetheless, they felt the offer afforded savings and they signed the installment sales contract.

119. The total obligation and interest were explained to them but they were not told that the contract would be sold to a finance company (Tr. 1206, 1214). After reflection at home, Mr. and Mrs. Bonner decided they were not saving as much as they thought. They called New Markets to cancel the contract and were told it had been sold to a finance company (Tr. 1207). They did not know the contract had not been cancelled as requested until they received a coupon book from the finance company a few days later (Tr. 1208). Mrs. Bonner's employer, an attorney, wrote a letter to New Markets and the contract was eventually cancelled. Mrs. Bonner did not describe the sales presentation (which had not been read) as either emotional or harassing but the salesman had told them they had only one chance to accept his offer (Tr. 1213-15).

(e) Lee

120. Robert H. Lee, Jr., St. Paul, Minnesota, is a writer with the University of Minnesota news service. He [45] received a letter from New Markets, Inc. with a sealed envelope enclosed offering the free gift indicated inside the envelope. He opened the envelope, found a vacation offer and threw it away. The Lees moved and, after

receiving a letter with a gift envelope at their new address, they made an appointment to visit New Markets (Tr. 1220-22). Mr. Lee was not told there would be a sales presentation and assumed that the gift offer and showing of products were part of a market research program (Tr. 1228).

121. They were ushered into the salesman's office soon after they arrived at New Markets. The salesman said he was new at the job and asked if he might read from a looseleaf notebook placed in front of him on his desk.

122. The salesman opened the sealed envelope which contained a vacation offer, explained that not all expenses were paid by the certificate and asked the Lees' choice of several available vacation cities (Tr. 1223).

123. The salesman asked the Lees to rank and rate various products according to which they felt they needed most and they were then shown brochures on the larger products and were asked to estimate values.

124. The salesman himself arrived at a value for the group of products which Mr. and Mrs. Lee had said they could use and offered the products to the Lees at about half that amount if they would agree to write testimonial letters about the products (Tr. 1224-25).

125. Mr. Lee declined the package offer but agreed to buy the automobile stabilizer because of problems he had with his car and because ". . .we felt that would be the one way to get out of there." (Tr. 1225). Mr. Lee told the salesman they did not want the purchase financed but they would pay cash in 90 days (Tr. 1225-26).

126. Mr. Lee testified that they felt emotionally drained after the presentation and asked the salesman to deliver the product later, thinking they might be able to cancel the contract (Tr. 1226).

127. When Mr. Lee received a finance company coupon book in the mail several days later he threw it away. He was angry because he had not been told the contract would [46] be sold and had explicitly asked that it not be. Although he was not certain, he thought the contract had been sold to a company owned by Emdeko (Tr. 1227, 1242). New Markets, Inc. phoned the Lees several times to arrange a delivery date for the stabilizer. Mrs. Lee finally told the distributor that they did not want the product and they did not hear from him or the finance company thereafter (Tr. 1227).

(f) Eberle

128. Raymond Eberle of Santee, California is a painter for San Diego County. In May 1973, Mrs. Eberle received a Soup-O-Gram offering a free case of soup for visiting the offices of National

Products Company, the local Emdeko distributor (CX 407; Tr. 1248-49). They called for an appointment and both Mr. and Mrs. Eberle went to the distributor's offices as requested. They were not told a sales presentation would be given.

129. After they arrived at National Products, the Eberles were shown three movies portraying the quality of and need for Emdeko products (Tr. 1249) and were then taken to a cubicle and shown pictures of different products. A salesman asked them which of the products they were particularly interested in. They were told that the questions were part of a survey to get people's opinions of the products and to solicit letters of recommendation and they were shown testimonial letters from other people (Tr. 1250-67).

130. They did not realize this was a sales presentation until the salesman offered them a chance to buy all the products for which they had expressed a need. They responded that the price was too high and that they had not known they were invited to the offices to buy something. They started to leave when the salesman left to talk to his supervisor and returned with an offer about one-half the cost of the first offer. When this offer was also declined, an even lower price was quoted if the Eberles would agree to write testimonial letters (Tr. 1250-52).

131. The Eberles then signed a contract and made a downpayment. The terms of the contract were explained and there was a notice on the back of the contract that it would be sold to a finance company; however, this notice [47] was not pointed out and Mr. Eberle did not see it until he returned home (Tr. 1253, 1265). They were also not told about the 3-day cooling-off period which the law allowed. The Eberles received their free gift at the end of the sales presentation (Tr. 1256).

132. When Mr. Eberle discovered the contract would be sold he called the consumer affairs bureau. As advised, he immediately sent a letter cancelling the contract and returned the product he had taken home with him (Tr. 1253-54).

133. The sales presentation had not been read and had lasted about one hour and a half including the time spent watching the movies. Mr. Eberle did not feel that they had been harassed but that it was ". . .a job of supersalesmanship." (Tr. 1265-66).

(g) Stro

134. Mr. Jack A. Stro is a junior high school counselor from Bonita, California. Mr. and Mrs. Stro received a Soup-O-Gram (CX 407) offering them a case of canned soup if they would call the

number listed on the bottom of the notice within 24 hours to make an appointment to pick up the soup (Tr. 1395-96).

135. Mr. and Mrs. Stro made an appointment and went to the offices of National Products, an Emdeko distributor in Chula Vista, California. They were asked to watch several movies after which they were to receive their free gift of soup. One movie described how and where Emdeko products were made and extolled the quality of the products. Another movie was narrated by Audie Murphy (Tr. 1397-98).

136. After the movies, Mr. and Mrs. Stro were taken to a cubicle where a saleswoman asked them to view Emdeko products, ostensibly for a survey. She showed them brochures about the products and asked them to select those which they would like to have in their home. She showed them letters from other people complimenting Emdeko products, explained that this was their method of advertising (Tr. 1399) and suggested that the distributor, National Products, was an advertising group working for National Housewares (Tr. 1402). She said she would give them the products they had selected if they would sign a letter release form and promise to write testimonial letters.

[48] 137. A number, 569, was written on the top of the letter authorization form Mr. Stro was asked to sign. He became wary and asked what the 569 meant. The saleswoman told him they were being given that amount of credit. Mr. Stro read the document further and realized it was a sales contract. He confronted the saleswoman and was told the products were free but a small amount must be charged to eliminate gift tax problems. At this time Mr. Stro demanded the free gift and was given a set of steak knives. Mr. and Mrs. Stro left the office and reported the incident to the Chula Vista police department (Tr. 1400).

138. Mr. Stro had previously been involved in a consumer testing program and upon receiving the Soup-O-Gram believed this was similar. He was not told there would be a sales presentation and did not discover this until he read the letter authorization he was asked to sign and found it was a sales contract (Tr. 1402).

139. Mr. and Mrs. Stro spent about 50 minutes at National Products. During the sales presentation, the saleswoman did not read from a prepared script. Mr. Stro testified that he did not feel that the presentation was particularly emotional or high pressure, only that it was a misrepresentation (Tr. 1402, 1409).

(h) Ballenger

140. Howard Ballenger of Laurel, Maryland received a telephone

call at his home in March 1975, inquiring about several products used in his home and asking whether his family would be interested in receiving free merchandise. He was told that people who cooperated with the inquiry would be sent invitations to pick up free gifts. A few days later Mr. Ballenger received such a letter with a sealed envelope enclosed indicating what gift he would receive. This mailout included a list of products which were gift possibilities and information about a $75,000 sweepstakes. As requested in the letter, Mr. and Mrs. Ballenger set up an appointment with Nu-Way Enterprises, the Emdeko distributor in Landover, Maryland (Tr. 1483-84).

141. After they arrived at Nu-Way, Mr. and Mrs. Ballenger were asked to look at pictures of people allegedly living in the community who had received gifts worth over $30 and were asked to watch a movie narrated by Audie Murphy. After the movie and a few minutes spent looking at displayed [49] products, the Ballengers were escorted into a salesman's office (Tr. 1485).

142. The salesman opened the sealed envelope the Ballengers brought with them and said they were to receive cordless electric scissors which he immediately gave to Mrs. Ballenger. While the salesman was absent, Mr. and Mrs. Ballenger noticed their conversation was being recorded (Tr. 1486).

143. The salesman entered their name in the $75,000 contest and asked them their choice of prizes should they win. They were shown brochures about products, were asked to select the products they would like to have in their home and were asked to estimate the value of each selection. The salesman countered each estimate with a statement about the cost of a comparable name brand product (Tr. 1487-88).

144. The salesman then offered them a total price for the package of products they had selected if they would agree to write testimonial letters (CX 24) and they were shown letters written by other people. Until this offer was made Mr. Ballenger did not know they were being given a sales presentation. They had been told the gift program was initiated as a way to advertise products (Tr. 1490).

145. The Ballengers purchased the products and signed the financing agreement which included an insurance charge they were not told about. The total price, the finance charge and monthly payments were explained to them. They were not told the contract would be sold to a finance company but received the impression that Nu-Way did their own financing. The allowance of a 3-day cooling-off period was not made known to the Ballengers. In fact, the section on

the contract which stated they could cancel in three days was stamped "does not apply." (Tr. 1491, 1499, 1500, 1512).

146. The Ballengers received all the merchandise at the time of the sale. After unloading the merchandise, the Ballengers decided they no longer wanted it. Mr. Ballenger called the salesman the following Monday and expressed his dissatisfaction with the quality of the products. A serviceman came to inspect the products and found nothing wrong. Mr. Ballenger again called the salesman and was told to call Mr. Phillips, the distributor. Mr. Phillips refused to cancel the agreement (Tr. 1495-98).

[50] 147. In the meantime, the Ballengers received notification from the finance company to whom the contract had been sold. Mr. Ballenger explained his situation to the finance company and it stopped payment on their check to Nu-Way. About four or five months later, Nu-Way picked up the merchandise held by the Ballengers (Tr. 1499).

148. The Ballengers were not told a sales presentation would be given at Nu-Way and they spent about 2 1/2 hours at the Nu-Way offices. The sales presentation was not read but Mr. Ballenger testified that he felt he was placed under great pressure to buy during the presentation (Tr. 1500-05).

(i) *Jaynes*

149. Floyd Edward Jaynes, Jr., a construction worker from Jackson, Mississippi, received a postcard from Helton Distributors in 1972, telling him that he and his wife had been selected to receive a free gift. Mrs. Jaynes called the number listed on the card and set up an appointment to pick up the gift (Tr. 1516).

150. They arrived at the location described over the phone and found a storefront building displaying Emdeko products. They were ushered into a salesman's office where they inquired about their free gift. The salesman asked if he could speak to them for a few minutes, took out brochures describing various products and asked Mr. and Mrs. Jaynes to select several products they could use in their home. He also asked them to estimate the value of each selected product (Tr. 1517-20).

151. The salesman indicated that the Emdeko brand of products was being introduced into the South and that the company felt the best method of advertisement was to put the products into people's homes and to rely on word of mouth. He then asked Mr. and Mrs. Jaynes if they would write testimonial letters on the products they had selected. When the Jaynes agreed to write letters, the salesman said they could have all the products they had selected for $600 plus

testimonial letters for each product (Tr. 1519). Until the package price was quoted, Mr. Jaynes did not know this was a sales presentation but felt it was some sort of advertising program (Tr. 1521-22).

152. The salesman had filled out the sales contract during his presentation. The Jaynes asked if they could consider the contract overnight, but they were told it was [51] a one-time offer. They asked if they could be alone to discuss the purchase. The salesman left for five minutes. During that time the Jaynes decided not to accept the offer (Tr. 1520-22).

153. Mr. and Mrs. Jaynes received a hotel accommodations certificate as a gift just before leaving. The Jaynes had spent about one hour at Helton Distributors.

154. Mr. Jaynes felt it was a high pressure "pitch" because the salesman's presentation moved rapidly, after the brochures, to the letters of recommendation and contract. The salesman read from a manuscript during the presentation (Tr. 1524, 1541).

(j) Smith

155. In April 1975, Robert A. Smith of Pensacola, Florida received a "second and final" notice from Helton Distributing Company to pick up a gift within a certain number of days or it would be sent back to the warehouse. Mr. and Mrs. Smith had been recently married, and, although it was not indicated on the postcard, they thought that either the warehouse was holding a wedding present ordered by someone or that the gift offer was part of an advertising program. Mr. Smith called the number listed on the card and inquired about the nature of the gift. The woman who talked to Mr. Smith said she could not determine what the gift was over the phone but scheduled a time the next day for the Smiths to pick up the gift (Tr. 1694-95, 1706).

156. After arriving at the distributor's offices, the Smiths were shown a movie narrated by Audie Murphy and were shown several household products on display. They were then introduced to a salesman and asked to join him in his office (Tr. 1696).

157. The salesman made small talk and explained briefly about Emdeko products. He told them he was required to read to them from a manuscript and said that they were there for three things: to be entered into a bonus contest, to receive a free gift, and to receive a fantastic offer. The salesman gave them a carving set as a gift (Tr. 1697, 1716).

158. The salesman then showed them brochures on several products and asked them to pick the products they could use in their

home. He explained many of the products in detail [52] and displayed pictures of burned children while discussing the fire alarms (Tr. 1699).

159. The Smiths were asked to estimate the value of the products. The salesman corrected them when their estimates did not agree with his. Although not revealed to him, Mr. Smith assumed at this time that the products were for sale. He asked for several days to think over the price which was finally offered for the package and he was told it was a one-time only offer (Tr. 1700).

160. Mrs. Smith was not feeling well and asked to be excused from the room. The salesman then told Mr. Smith that the purchase could be financed but did not go into actual financing arrangements. The salesman kept pushing a letter authorization form at Mr. Smith. He had been told that if he wrote a testimonial letter, such as those previously shown him, a microwave oven would be added to the package offer at no extra cost (Tr. 1701-03).

161. Mr. Smith declined the offer and got up to leave. The salesman said he wanted to talk to Mrs. Smith and approached her as they were leaving. The salesman followed them out into the public hall beyond the door. Mr. Smith attempted to give the gift back but the salesman refused to take it. In the meantime, Mrs. Smith, who was very upset, started to cry. The Smiths' contact with Helton Distributing lasted about an hour (Tr. 1704-06).

(k) Ashman

162. Jay I. Ashman from Richmond, Vermont is an assistant attorney general in the consumer fraud division of the Vermont attorney general's office. During December 1974, Mr. Ashman visited the local Emdeko distributorship, PMA, Inc. (Tr. 1724-25). Mr. and Mrs. Ashman had received a mail solicitation at home inviting them to come to the PMA offices, receive a free gift, and review PMA's line of products. At work the next day, Mr. Ashman inquired about PMA and discovered that there had been one comsumer complaint. Out of curiosity, he called PMA and arranged an appointment (Tr. 1726).

163. Mr. Ashman testified that he visited PMA with his wife as an employee in the consumer fraud division and also as a consumer. He tape recorded his conversation with the salesman (Tr. 1727).

[53] 164. Mr. and Mrs. Ashman were shown two movies; the Audie Murphy movie and a film on the fire alarms. After they watched the movies and looked at displayed products they met a salesman and were ushered into his office. After friendly introductory conversation, the salesman gave them a carving set. They were told they were

entitled to enter the bonus contest based on what they would write about Emdeko products and their visit to PMA and were asked to select among several possible prizes for the bonus contest. They were then told that if they qualified they could take some of the products home (Tr. 1728-30).

165. The salesman showed brochures to the Ashmans and asked them to select products from those depicted which they could use in their home. The salesman asked what features they liked about their selections and how they might benefit from them. He showed them clippings and letters about the fire alarms, one of the Ashmans' selections. The salesman showed them a contract for a comparable alarm system to indicate the value and asked them to estimate the cost of all their selections (Tr. 1731-34).

166. The salesman explained the testimonial letter-writing program and claimed that the company advertised by placing products in people's homes. He told them there was a cost to the offer but because it was a special promotional low cost offer it could be made only one time and must be accepted with a promise to write letters (Tr. 1736-38). This was the first time throughout the presentation, which was both read and ad-libbed, that it was mentioned that the products were for sale.

167. The salesman asked the Ashmans to sign the letter authorization form and inquired how they would pay for the purchase. He indicated that most customers financed, but he did not reveal until asked that the contract would be sold to a finance company. The Ashmans also asked about interest charges and were not given a total charge but were told it was included in the monthly payment (Tr. 1739).

168. The Ashmans were told that PMA would eventually open a retail store and that they were presently limiting the number of sales per geographic area. Mr. Ashman asked if they could think about the offer until the next day. The salesman agreed although he said it was against his orders. Mr. Ashman later called and declined the offer (Tr. 1741-42). [54]

(l) Zepfel

169. Ida Zepfel is a housewife from Pittsburgh, Pennsylvania. In the fall of 1970, she was phoned and asked to take part in a survey. She was asked questions about her children and about her husband's occupation. Several weeks later she received a letter thanking her for taking part in the survey and giving her a number to call for a free gift. She called and was told she must be accompanied by her

husband to pick up the gift and that there were "no strings attached" to the offer (Tr. 1779-80).

170. After arriving at Amco, the Emdeko distributor in Pittsburgh, Mr. and Mr. Zepfel were taken to a salesman's office. They were shown pictures of various products, were asked their opinion of them and were then shown a display of some of the products. The salesman asked them to choose several of the products which they would like in their own home and they were asked to estimate the value of the products they had selected. Mr. and Mrs. Zepfel were then told that as a form of advertising the products were placed in people's homes for a minimal amount and an agreement to write testimonial letters (Tr. 1781-84).

171. The salesman gave the Zepfels a financing agreement which they signed. They were told that the contract would be sold to a finance company but were not told specifically which company (Tr. 1783, 1798).

172. They were in the Amco store for about an hour and left with the merchandise they had purchased. When they were outside the door, they remembered the free gift. Mr. Zepfel went back and asked for it. The salesman gave them a tabletop barbeque grill and a small bottle of perfume (Tr. 1788, 1801-02).

173. Mrs. Zepfel testified that she felt pressure was put on them to buy while they were in the salesman's office and that they were caught by a sales gimmick. They did not write testimonial letters as agreed but were never contacted again by Amco (Tr. 1783, 1788, 1792).

(m) Fidei

174. Frank P. Fidei is a mechanical engineer from Pittsburgh. In June 1970, he and his wife were contacted by Amco, the local Emdeko distributor, and were asked to [55] participate in a survey. They were asked several questions about products they used, about Mr. Fidei's occupation, and about the number of children in their family. They were told that they would receive a letter inviting them to review products and that they would receive a free gift, but they ignored the letter when it came in the mail. They were phoned again and asked if they were going to make an appointment but they declined. Several days later they were again phoned by Amco and it was hinted to them that the gift was a high value household product so they agreed to an appointment (Tr. 1804-06).

175. They went to Amco as scheduled and, after waiting 20 or 30 minutes, were taken to a salesman's office. He read to them from a prepared booklet. The salesman showed them brochures on several

products, elicited their opinions of the products and compared the products to allegedly similar brand name items. The salesman asked them which of the products they would pick as a free gift (Tr. 1807-09).

176. Mr. and Mrs. Fidei selected several products and were taken to another room to look at them. The salesman placed values on the products and gave detailed explanations about the products the Fideis had chosen. They were shown pictures of burned children during the presentation about the fire alarms (Tr. 1809, 1825). The salesman told them they could have two of the products at no extra cost if they bought the fire alarms and if they would agree to write testimonial letters on the products. The salesman had previously shown them letters from other people who had the products the Fideis had selected (Tr. 1810).

177. After Mr. Fidei declined the offer and asked for the free gift, the salesman inferred the Fideis were irresponsible parents for not purchasing the fire alarm system (Tr. 1825).

178. Mr. Fidei asked to speak with the manager and expressed his displeasure regarding the time expended and money spent on a sitter because they had been told they would receive a gift. They were then given a carving set. Until this time, Mr. Fidei was under the impression they would receive one of the products they had selected as their free gift. The Fideis were at Amco for about 1 1/2 hours (Tr. 1812). [56]

F. *Respondents' Connection with Distributors' Representations*

(1) Introduction

179. The complaints allege that the corporate and individual respondents have placed into operation the sales method described above and that they control or encourage distributors' use of that method, a method which, through misrepresentation and concealment, deceives customers into purchasing Emdeko products.

180. There is no evidence that respondents actually control the sales presentations of Emdeko distributors. Rather, the evidence reveals that distributors are free to adopt whatever sales method they desire. For example, Albert Hughes Enterprises makes door-to-door sales, a method which is far removed from the showroom technique used by other distributors (Finding 95). Testimony of other distributors supports my conclusion. Some of them make sales presentations in the precise way that respondents suggest but others have introduced variations of their own. The same is true of the lead

systems in use, and the suggestions in the Derby Winner tapes are not followed by all distributors (Findings 59, 93, 97).

181. The reason for the variations in distributors' sales technique is evident. Respondents have no power to compel obedience to their suggestions because they have no control over Emdeko distributors and because the distributors are not economically dependent upon them (Findings 9-12; 15-23).

182. On the other hand, one cannot ignore the overall similarity between the distributors' sales presentations and the advice which respondents have given them over the years. Distributors use lead systems which offer free gifts to customers (Findings 58, 77, 81, 84, 87, 98, 102, 106, 113, 120, 128, 140, 150, 155, 162, 169) and the basic format of their sales presentations follows respondents' suggestions (Findings 60, 61, 63, 69, 77, 80, 85, 109-11, 116-18, 121-25, 129-30, 135-37, 141-44, 150-53, 156-59, 164-68, 170-71, 175-77). These similarities are not due to coincidence. They are a direct result of respondents' influence and the distributors' enthusiastic adoption of a sales method which encourages deception of customers.

183. Respondents' influence over its distributors began when National's principals taught some the package [57] method (Findings 78, 86). In turn, these distributors trained salesmen, many of whom eventually become Emdeko distributors (Footnote to Finding 80). From the beginning of their relationship with Emdeko distributors to the present time, respondents have advised and encouraged them to use the lead systems and make sales presentations (Findings 15-19, 25-48) which have resulted in the deceptive representations and failures to disclose which are described below.

(2) The Representation that Customers Are Specially Selected

184. Although Emdeko distributors do not seek the trade of certain undesirable categories of potential customers (Finding 35), no other selection of customers is made as long as they are qualified—*i.e.*, are not obvious credit risks. Any further selection would undoubtedly defeat the purpose of lead systems—to contact a large number of potential customers.[16] (See CX 350, p. 36.) In consequence, distributors use city directories and telephone books to contact as many families as possible (Tr. 513, 1891, 1892, 1924; Finding 66).

185. Despite their extensive mail and telephone solicitation of

[16] See CX 351, p. 8 which describes the purpose of a lead system:
Certainly the most important function of this business is securing *in volume* qualified prospects at a reasonable cost (emphasis added.)

many potential customers, Emdeko distributors lead those they contact to believe that they are among a few who have been specially selected. Respondents' distributor information manual illustrates a "GIFTOGRAM" lead method which in the intial message to consumers states: "CONGRATULATIONS. . . .Your family has been approved to receive some of the $12,500.00 in fine products to be given away without obligation" (CX 350, p. 44). The illustrated "GIFTOGRAM" or close variations containing the "has been approved" representation were in fact used by distributors (CX 374–"GIFTOGRAM," Mark III Enterprises, Luray, Va.; CX 375, 20th Century Products, Chula Vista, Calif., *cf.* Tr. 1395-96; and National Products, El Cajon, Calif., *cf.* Tr. 1247).

(3) The Representation that a Survey Is Being Conducted

186. Since the purpose of a lead system is to attract potential customers to a sales presentation without revealing that fact, some other reason must be given for the initial solicitation. One obvious pretext is that the distributor is conducting a survey or gathering marketing information. Respondents' distributor information manual contains scripts to be used by distributors in their "Lead" systems. The script for the initial telephone contact for the "Questionnaire Script" begins:

> Hello, Mrs. ————. This is ———— from ————. We are taking a brief questionnaire on our behalf to determine the market potential in this area.
>
> What brand of soap do you use?. . . (CX 351K).
>
> Hello, Mrs. ————, this is ———— from ————. We are taking a brief questionnaire on our behalf of brand name products in this area.
>
> Is your can opener manual or electric?. . . (CX 350Z-38; see also CX 538S).

187. The effect of similar representations by other Emdeko distributors was confirmed by two customers who testified in these proceedings. Mr. Lee assumed that the letter and gift envelope he received from New Markets were part of a market research program (Finding 120) and Mr. Smith believed that Helton Distributors' gift offer was in connection with an advertising program (Finding 155).

188. In fact, Emdeko distributors are not in the business of conducting surveys or gathering marketing information. The purpose of the lead systems which they use is, rather, to filter out undesirable potential customers and to induce desirable ones to visit their places of business (Tr. 458-61).

(4) The Representation that Customers Will Be Given a Gift

189. The typical lead system used by Emedko distributors promises a free gift to customers who visit their [59] showrooms (Findings 27-35, 53, 56, 58, 61, 67, 81, 84, 87, 91, 96, 98, 102, 106, 113, 120, 128, 134, 140, 149, 155, 162, 169, 174).

190. In some cases, customers who visited distributors' places of business were not given free gifts until after sales presentations were made, but it is not clear whether these distributors deliberately withheld the gifts (Findings 131, 137, 153, 172). In most cases, distributors did give their customers free gifts simply for visiting the showroom and viewing a promotional film. They were not required to attend the complete sales presentation (Findings 53, 88, 99, 103, 107, 114, 142, 157).

191. Because of the wording of the gift offers, some customers might have been led to expect gifts of considerable value[17] rather than the modest ones which were in fact given them (see Finding 67); however, there is no evidence that distributors deliberately tried to foster such belief or that a substantial number of customers actually believed that they would receive valuable gifts.

192. Complaint counsel contend that customers are not "unqualifiedly" entitled to a free gift because some who are "undesirables" may be discouraged from attending the sales presentation. The problem with this theory is that the gift offer is not unqualified. For example, the direct mail lead method invites the customer ". . .to attend the showing of our Emdeko brand name products now ready for the public. . ." and indicates that he is ". . .entitled to receive one of the free gifts. . ." (CX 350, p. 38). This invitation could not possibly be misinterpreted: The customer must visit the distributors' showroom to get a gift. Of course, distributors do try to discourage undesirables from visiting their showrooms, but those who choose not to accept the offer (whether because of indifference or because they are discouraged by the distributors) are aware that they will not receive a gift.

193. I conclude, therefore, that the conditions of the distributors' gift offers are clear and that distributors do not deliberately withhold gifts from customers who visit their showrooms. [60]

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[17] I am not referring here to the Emdeko sweepstakes which is generally part of the sales presentation, but to the gift offers made in the solicitation letters.

(5) Failure To Disclose that a Sales Presentation Will Be Made

194. The result of National's constant exhortation in the Derby Tapes, the distributor information manuals and authorized marketing manuals has been the creation of a sales technique whose purpose is to deceive consumers into believing that no sales presentation will be made and that they are, instead, being asked to cooperate in some kind of advertising program or market survey.

195. Emdeko distributors do not reveal to their customers that a sales presentation will be made. The lead systems are designed to hide this fact (Findings 26-35) and the deception continues during the sales presentation by suggesting that customers are participating in an advertising program or a market survey (Findings 115, 129, 136, 141, 151, 166, 170, 174).

196. In fact, distributors do not conduct surveys or advertising programs and do not care whether customers participate in schemes like the letterwriting program which are supposedly used to promote Emdeko products (Findings 64, 100).

197. It is apparent that the distributors' lead systems and sales presentations have the capacity to mislead customers into believing that they are not attending a sales presentation. Customers' testimony simply confirms what is obvious. The salesman for New Markets told the Bonners that the gift offer was for advertising purposes, and the Bonners did not become aware of the real reason for the inducement until much later in the sales presentation (Finding 118). Mr. Lee went to New Markets because he believed it was conducting a market research program (Finding 120). The Eberles were told that National Products was engaged in a survey and did not suspect this representation until the salesman made them a package offer (Findings 129-30). Other customers testified to similar misconceptions about the real purpose of the invitations received from Emdeko distributors (Findings 110, 138, 144, 151, 155, 178).

198. It may well be that many potential customers suspect that they will be asked to buy something when they receive their free gift offers; but they may still, as did the Pritchards, go to the distributor's showroom because of the possibility that the invitation might be for some other purpose (Finding 105). [61]

(6) High Pressure Sales

199. Some Emdeko distributors harass, frighten and intimidate their customers during the sales presentation. The most familiar

technique is the use of a fast-talking pitch which does not give the customer a chance to think about the real purpose of the sales presentation or to object to it (Findings 42, 74, 154). Other techniques include insistence that customers accept the offer immediately (Findings 73, 101, 111, 119, 152, 159), presentations which last for more than an hour (Findings 54, 69, 104, 133, 148, 172), physical intimidation (Finding 112), disparagement of customers by suggesting that they are stingy (Finding 73), frightening customers by playing on their fear of fire (Findings 104, 158, 176, 177), and humiliation.[18]

200. While it is true that some customers did not feel that the sales presentations they attended were particularly high pressure (Findings 119, 133, 139), others testified that the tactics used by certain distributors put them under pressure to buy (Findings 148, 154, 173).

(7) Other Representations

201. The complaints challenge certain representations made to customers by Emdeko distributors which are not [62] directly attributable to advice given by National, although complaint counsel claim that National is responsible for such representations. These allegations are:

a. Distributors represent that customers who purchase products will be able to make subsequent purchases at a discount from the distributors' regular price.

b. Distributors represent that customers who purchase products will save money by buying a product in a package rather than by itself.

c. Distributors represent that customers can buy Emdeko products cheaper than comparable products sold by competitors.

d. Customers do not realize the extent of their monetary obligations when they purchase products from distributors.

e. Customers who purchase products from distributors are not informed that their obligations are transferred to financial institutions.

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[18] Ms. Maddox testified about the high pressure tactics used by her employer:

Q. What do you mean by high pressure?

A. Well, if someone says they can't take it, they would make them feel bad by saying, "What do you mean, you don't think enough of your family to protect them with fire alarms?" and what do you mean, you can't afford it, things like that, you know, high-pressure sales. They would argue with them.

Q. Did they—

A. (Interposing) They were under the attitude that if they weren't going to buy them, they were going to humiliate them before they walked out of the office (Tr. 1353).

202. Complaint counsel concede in their proposed findings that while there was some evidence "that distributors made price savings claims. . .The evidence did not clearly establish the falsity of these claims" (CPF, p. 63 n. 70). Therefore, allegations a, b, and c need not be discussed.

203. Complaint counsel's proposed findings in support of the allegation that customers do not realize the extent of their monetary obligations are rejected since I cannot infer this fact simply because distributors use high pressure tactics or because customers make minimum cash downpayments and relatively low monthly payments (CPF, p. 55). The most significant fact, I believe, is that not one customer testified that he was unaware of the extent of his monetary obligation.

204. Most Emdeko distributors arrange for the financing of prospects' purchases and although some customers testified that they were unaware their contract would be assigned to a finance company (Findings 119, 127, 145), there is no evidence that distributors deliberately conceal this fact. [63] Many of the distributors who testified insisted that they explain the contracts to their customers and several customers confirmed that they understood their contracts (Tr. 466-67, 780, 892, 1243, 1265, 1452, 1668-69, 1739, 1798-99, 1863, 1951-52, 2267).

(8) Respondents' Knowledge of Distributor Representations

205. In view of the advice and encouragement which it gives distributors, it is inconceivable that National is unaware that they might make and have made false and misleading representations to and concealed material facts from their customers. National's officers and employees were present at conventions and workshops where lead systems and sales presentations were discussed (Findings 16, 18, 19, 75), participated in the Derby Tapes (Findings 38-48), visited distributors and listened to their sales presentations (Finding 17), and authored and disseminated other publications which encourage distributors to deceive their customers (Findings 15, 26, 37, 38).

206. National is also aware of the deceptive potential of advice it gives distributors because of the legal problems in which several have become involved. National re-established a distributor who was closed down by Wisconsin authorities and Mr. Wanlass and an area director represented him before Oklahoma authorities when his practices were challenged in that state (Tr. 1037-38, 1043-45). Mr. Wanlass interceded on behalf of a distributor having legal problems with Vermont authorities (Tr. 1746-48) and a lawsuit was filed

against a National distributor, and National by the State of Minnesota (Tr. 1084-88). Finally, Mr. Wanlass interceded on behalf of a distributor who was being investigated by Washington state authorities (Tr. 2102).

207. It is true that some of the distributors did not follow National's advice to the letter and it is apparent that National did not condone some of the more odious techniques used by them. For example, when Mr. Wanlass was told that a salesman in Ken Owens' Denver distributorship asked whether a customer who could not afford to purchase a fire alarm "could afford to see our 14 month old baby in a casket," he disavowed the use of that kind of tactic (CX 267A, C). National may well have deplored the use of such tactics in other instances (RPF's 106-129), yet at the same time it was distributing and endorsing the Derby Tapes and information manuals, publications [64] which give explicit advice about sales techniques which lead to the deception of customers.

208. I conclude, therefore, that respondents are accountable for most of the representations challenged in the complaint because they developed a sales technique which encourages its practitioners to deceive customers. Respondents encouraged Emdeko distributors to tell customers that they were specially selected or that they were taking part in a survey and respondents encouraged Emdeko distributors to avoid any hint that a sales presentation would be made. It is not surprising, then, that some distributors used high pressure tactics on their customers or used other deceptive tactics, and because of this I reject respondents' denial of responsibility for the distributors' deceptions.

209. On the other hand, respondents did not advise distributors to withhold gifts from their customers (and most distributors did not do so), did not advise them to deceive their customers about the extent of their monetary obligations and did not advise them to hide the fact that their obligations are transferred to financial institutions. I therefore reject complaint counsel's claims with respect to these three allegations.

(9) Commission Approval of Certain Documents

210. On June 17, 1969, the Commission accepted a series of letters received from National as evidencing compliance with the February 12, 1968 order in Dkt. 8733, the order which complaint counsel seek to modify.

211. The materials accepted by the Commission as being in compliance with its order are the Emdeko authorized marketing manual (virtually identical to the marketing manuals containing

canned sales presentations, CX's 367 and 454), a telephone script (RX's 24E-F and 25C-D) and an invitation letter, RX 24D (later revised, RX's 25E-26B). National disseminated these materials to distributors (RX 20A-C) and they are claimed by National to disclose that a sales presentation will be made (RPF's 131, 132, 152). Whether they do or not, National subsequently disseminated other material in which it advised distributors to hide the fact that a sales presentation would be made (CX 350 and the Derby Tapes, described in Findings 23-35 and 38-48).

III. CONCLUSIONS OF LAW

A. *The Distributors' Representations*

The evidence presented by complaint counsel in these proceedings establishes that several Emdeko distributors have adopted respondents' recommended sales techniques and have deceived their customers by:

1. Representing, contrary to the truth, that they are specially selected;
2. Representing, contrary to the truth, that a survey is being conducted;
3. Not disclosing that they will be given a sales presentation; and
4. Selling them products through the use of high pressure tactics.

Respondents' defense of the distributors' conduct requires only a short discussion. Whether the distributors' customers were convinced by the sales presentation to purchase products is not crucial for the Commission can outlaw practices whose tendency to deceive has been established. *Goodman* v. *FTC*, 244 F.2d 584, 604 (9th Cir. 1957). Thus, although they did so, complaint counsel were not required to show actual deception of the distributors' customers or out-of-pocket loss, see *Charles of the Ritz* v. *FTC*, 143 F.2d 676 (2d Cir. 1944).

Some customers are undoubtedly satisfied with the Emdeko products they have purchased and some have undoubtedly been able to cancel contracts with Emdeko distributors (RPF 56) but this does not make the distributors' acts any less deceptive, for consumers are entitled to be truthfully informed about the purpose of solicitations to visit the distributors' offices, *Encyclopedia Britannica, Inc.* [1973-76 Transfer Binder] Trade Reg. Rep. ¶ 21,119 (March 9, 1976 [87 F.T.C. 421]) and are entitled to protection from high-pressure tactics when they do attend a sales presentation because these tactics interfere with their right to make an intelligent purchasing decision.

Compare *Beneficial Corp.* [1973-76 Transfer Binder] Trade Reg. Rep. ¶20,959, p. 20,821 (July 15, 1975 [86 F.T.C. 119]). Whether those customers who were deceived should have been more suspicious and should have realized the real purpose of the [66] distributors' solicitation is beside the point. *Charles of the Ritz, supra* at 679. Furthermore, even wary consumers might not realize the true purpose of the distributors' solicitations, for the lead systems disseminated by the respondents are rather sophisticated masquerades which have been developed by knowledgeable merchandisers.

B. *The Order*

(1) The Need for a Modified Order

The consent order in Dkt. 8733 was designed to make certain that customers of Emdeko distributors were informed that they were being solicited for the purpose of attending a sales presentation. The agreed-upon order directed National and certain individual respondents from directly making false representations about the purpose of sales solicitations or from furnishing distributors, retailers or franchisers with any means or instrumentalities which contain such representations.

The record in these proceedings reveals that the purpose of the consent agreement in Dkt. 8733 has not been fulfilled, for Emdeko distributors are deceiving their customers about the purpose of solicitations. There are several reasons for the failure of the consent agreement in Dkt. 8733. First, National has disseminated suggested lead materials to Emdeko distributors which, while perhaps adhering to the letter of the consent agreement, do not satisfy its underlying purpose. Second, other lead materials have clearly violated the language of the orders. Third, although National has urged distributors to abandon some of their more blatantly deceptive sales tactics, the distributors have been free to ignore such advice.

Under the circumstances described above, I believe that modification of the consent agreement is proper, although the Commission might well have instituted contempt proceedings despite its acceptance of National's compliance report.[19] See *Mohr* v. *FTC*, 272 F.2d 401 (9th Cir. 1959), *cert. denied* 362 U.S. 920 (1960). [67]

(2) The Surveillance Provision

The evidence presented by complaint counsel in these proceedings reveals that the Emdeko distributors, who are not parties, deceive

[19] Complaint counsel point out in their reply findings that the lead letter submitted by respondents in their compliance report "is in stark contrast to lead materials subsequently disseminated by respondents" (pp. 9-10).

their customers whereas the named parties have no customers which they can deceive.[20]

The Commission apparently chose not to sue those involved in the direct deception of consumers to test the following theory: That those (the named respondents) who provide their customers (the Emdeko distributors) the means of deception are not only responsible for such deception but can be required to police their customers' compliance with the law and can be required to apply sanctions for their customers' noncompliance.

It is axiomatic "[T]hat a person is a wrongdoer who so furnishes another with the means of consummating a fraud. . . ." *FTC* v. *Winsted Hosiery Co.*, 258 U.S. 483, 494 (1922) and there is little question that I may enter an order which prohibits the respondents from furnishing Emdeko distributors with documents such as the lead systems described above[21] but complaint counsel say that this does not go far enough. They insist that there must be some way to make certain that not only the named respondents but the Emdeko distributors comply with any order which is entered.

There is, of course, one sure way of doing this: Name as respondents not only National, Emdeko and Messrs. Wanlass and Gilson but also every Emdeko distributor; however, there is an obvious disadvantage to this procedure and complaint counsel urge, instead, the adoption of a surveillance procedure under which drastic sanctions can be applied to the Emdeko distributors without involving the Commission in those difficult problems which arise when one is given his day in court. The scheme is simple enough, but its implications, as discussed below, are disturbing. Under the proposed orders, Emdeko must decide whether a distributor [68] has violated the order and, if it makes such a finding, it must terminate the distributor.[22]

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[20] Emdeko apparently does sell some products at retail but these sales are not involved in the present proceedings.

[21] The consent agreement in Dkt. 8733 contains such a provision.

[22] IT IS FURTHER ORDERED that Respondents. . . .

4. Upon receiving actual knowledge from any source (including but not limited to Respondents' program of surveillance, consumer complaints, or representatives of the Federal Trade Commission) of facts indicating a Violation of any provision of this Order by any Distributor, or by any of such Distributor's present and future dealers, franchisees, licensees, employees, salesmen, agents, solicitors, independent contractors, or customers, Respondents shall within 24 hours notify such Distributor by certified mail, return receipt requested, that such violation of this Order has occurred ("Notice"), and that Respondents will permanently discontinue dealing with said Distributor upon receipt by Respondents of actual knowledge of one (1) or more further Violations of this Order by such Distributor, or any of such Distributor's present and future dealers, franchisees, licensees, employees, salesmen, agents, solicitors, independent contractors, or customers, within one hundred and eighty (180) days of receipt of said Notice by such Distributor. Respondents shall obtain from such Distributor written acknowledgement of receipt of such Notice, which acknowledgement shall indicate the date of receipt of such Notice.

Upon receiving actual knowledge from any source (including but not limited to Respondents' program of surveillance, consumer complaints or representatives of the Federal Trade Commission) of facts indicating one (1) or more Violations of any provision of this Order, within one hundred eighty (180) days following a

(Continued)

Complaint counsel attempt to justify this procedure by arguing that respondents and the Emdeko distributors are [69] engaged in a "unitary enterprise" (CPF, pp. 25-29). Alternatively, they argue that since respondents have the inherent authority to prevent their customers' deceptive acts and practices and have not done so, they are liable for those acts and practices (CPF, pp. 13-24).

The difficulty is that complaint counsel's "inherent authority" theory relies on a case which is so inapposite that, if anything, it disproves the theory. That case is *P. F. Collier & Son Corp.* v. *FTC*, 427 F.2d 261 (6th Cir.), *cert. denied*, 400 U.S. 926 (1970) in which the Commission held that a parent was responsible for the activities of a subsidiary and noted:

> The enterprise is clearly a unitary one, regardless of the particular corporate structure adopted at any given time through which to carry out the Crowell-Collier business. 75 F.T.C. 241, 291 (1969).

However, as respondents point out, this statement was made because there was no question that the parent was intimately involved with its subsidiary. Crowell-Collier not only wholly owned its subsidiary, it

> interchanged personnel with its subsidiaries and maintained common or overlapping officers and directors; operated through its subsidiaries, which were often created and dissolved for purposes unrelated to the business carried on by the corporate complex; approved the use by its subsidiaries of the parent's name and goodwill in order to develop favorable public associations between the parent and its subsidiaries; and possessed and exercised ultimate control over Collier & Son. *P. F. Collier, supra* at 267.

It has been proved in these proceedings that none of the respondents now own any of the stock of incorporated distributors. The individual respondents do not serve as officers or directors of incorporated distributors and the corporate respondents share no officers or directors with incorporated distributors. The distributors were not created or dissolved by the respondents, and respondents did not possess or exercise ultimate control over Emdeko distributors. Respondents did permit some use of the Emdeko trademark by distributors but to no greater extent than any manufacturer permits its purchasers similar liberties. The factual distinctions between these proceedings and *P. F. Collier* could not be more striking.

[70] The same problem exists when complaint counsel's "unitary enterprise" theory is analyzed, for the cases cited as supporting it

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Distributor's receipt of the aforesaid "Notice," by a Distributor, or by any of such Distributor's present or future dealers, franchisees, licensees, employees, salesmen, agents, solicitors, independent contractors, or customers, Respondents shall permanently discontinue dealing with such Distributor.

have no discernible relationship to the theory. For example, complaint counsel argue that seller and buyer are engaged in a unitary enterprise if the seller exercises direction and control over the buyer's nominally independent enterprise, citing, *inter alia* (with a *cf.*), *P. F. Collier,* which did not involve buyer and seller but parent and wholly-owned subsidiary. They also claim that buyer and seller are engaged in a unitary enterprise if the buyer uses the name and reputation of the seller in representing the product's name, but the cases cited (CPF, p. 26 n. 39) do not involve a seller-buyer relationship. For example, *Globe Readers Service, Inc.* v. *FTC,* 285 F.2d 692 (7th Cir. 1961) was concerned with a transparent attempt by a magazine subscription business to insulate itself from liability for its solicitors' representations by setting them up as independent contractors. The court affirmed a Commission finding that respondent was liable for its solicitors' acts and practices but there was no evidence that the solicitors purchased and resold magazines; instead, they simply took orders on behalf of respondent. It is true that the solicitor used respondent's name when contacting customers, but this was not a basis for liability; indeed, the court noted that respondent referred to the solicitor as "the agent" and "our representative." *Id.* at 695. The same problem exists with respect to all of the cases cited by complaint counsel. None directly support the theory and it requires greater imagination than I have to find a convincing connection between their facts and the facts in these proceedings.

Nevertheless, while I do not accept complaint counsel's legal reasoning, I conclude that respondents are answerable for the distributors' acts and practices since they developed, disseminated and recommended the use of a deceptive sales technique. Furthermore, because of respondents' involvement with the distributors' illegal acts and practices, I will enter an order prohibiting them from engaging directly in such acts or practices or from furnishing the distributors with deceptive lead systems and sales presentations; however, this is nothing new. See *Winsted, supra.*

What I cannot and will not do is enter an order which, in effect, applies legal sanctions to distributors who are not parties to the proceeding and which permits those [71] sanctions to be enforced, not by the Commission or the courts, but by the named respondents.

Complaint counsel wave away this problem: "One of the advantages of the 'bright line' compliance requirements in the order is that they will eliminate uncertainty regarding what practices will result in termination" (CPF, p. 65). In other words, since the order's

language is so clear, we can safely trust respondents with deciding which distributors have violated its terms.[22]

Under this doctrine, a singular result would obtain: If the Commission believes, in the future, that the named respondents are violating the order (assuming that one is entered), it will have to institute contempt proceedings and accord respondents all of the benefits of due process. On the other hand, distributors who are *not* parties to these proceedings and who have been given no opportunity to challenge the order could be terminated by respondents for "violations" of the order without being permitted to contest the termination either before the Commission or the courts.

Complaint counsel respond that this is no great hardship since distributors can now be terminated at will but that is not a certainty in view of some of the distributors' substantial investments in their businesses. Furthermore, the distributors might have advanced other arguments to refute the claim that they can be terminated at will if they had been given the opportunity to intervene in these proceedings.

Although the distributors are undoubtedly aware of these proceedings, they are not sophisticated enough to divine that entry of the proposed order could result in their termination and there is no evidence that the Commission informed them of this fact. While the distributors [72] might not be indispensible parties to these proceedings,[23] they certainly had the right to intervene in them and might have attempted to do so if they were informed of the possible effect of the proposed order. See *Pepsico Inc.* v. *FTC*, 472 F.2d 179, 184 (2d Cir. 1972), *cert. denied*, 414 U.S. 876 (1973) ("If this had been a civil action, intervention by the bottlers would have been not a matter of grace but of right. . . "). The distributors were denied that right by the Commission's inaction.

One final consideration must be mentioned. The testimony presented by complaint counsel establishes that several Emdeko distributors have engaged in some of the practices challenged in the complaints and it might be argued that despite the procedural problems discussed above, the sanction of discontinuance is justified. However, it may be that there are several Emdeko distributors who have not adopted respondents' recommended sales techniques and who are not deceiving their customers. With respect to this class of

[22] I do not share complaint counsel's optimistic claim that the proposed order contains no uncertainties. The Commission probably believed that the order it entered against the Colgate Company prohibiting the use of mockups was a model of lucidity, but two Court of Appeals decisions, a clarification of the order by the Commission and Supreme Court review were required before its meaning was finally settled. See *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

[23] Compare *National Licorice Co.* v. *NLRB*, 309 U.S. 350, 365 (1940) with *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 233-34 (1938).

distributors, at least, I believe it is unfair to deny them the right to intervene and show that the sanction of discontinuance should not be imposed.

Thus, because the distributors were not given the right to intervene and challenge the surveillance procedure and because of my misgivings about the fairness of that procedure, I will not enter that part of the order which requires respondents to terminate distributors who violate the order. Because of this, there is no need to resolve the dispute between complaint counsel and respondents over what type of customer should be included in the definition of distributor.[24]

(3) Holder in Due Course and Cooling Off Disclosure

Respondents did not suggest that distributors withhold from their customers the fact that their obligations might [73] be assigned to a financial institution nor did they encourage distributors to hide from their customers their right to cancel sales contracts within three business days, and including prohibitions against such conduct in the order is not justified. In any event, since statutes and regulations mandate inclusion of holder in due course and cooling off language in all sales contracts, putting identical language in the order is unnecessary. See *Mutual Construction Co.* [1973-76 Transfer Binder] Trade Reg. Rep. ¶ 21,121 (March 30, 1976 [87 F.T.C. 621]).

(4) Savings Representations

Complaint counsel have abandoned their claim that respondents have made false price savings representations and that part of the proposed order relating to this claim will not be entered.

(5) The Verbatim Disclosure

Respondents object to inclusion in the order of a requirement that respondents specifically disclose that they are making a sales presentation. The evidence presented in these proceedings convinces me, however, that the most unequivocal disclosure of the true purpose of the distributors' solicitations and sales presentations, including the 3" x 5" card, is essential; otherwise, distributors will continue successfully to hide that purpose from their customers. See *Encyclopedia Britannica, supra:*

The company-prescribed disguise techniques necessitate inclusion of an order

[24] Although the word will be included in the order I enter, respondents cannot dispute the conclusion that they can be prohibited from providing any of their customers (whether they are Emdeko distributors or retailers such as J. C. Penney) with the instrumentalities with which to deceive the ultimate consumer.

provision requiring clear and conspicuous disclosure of the fact that the representative is a salesman and of the true purpose of gaining entry into the home.

I have also added an order provision requiring respondents to encourage certain customers to make the same verbatim disclosures in their (the customers') sales presentations.

(6) Liability of the Individual Respondents

Messrs. Wanlass and Gilson are shareholders in and hold policymaking positions with the corporate respondents and were deeply involved in the development and dissemination of deceptive lead materials and sales presentation techniques. Furthermore, in the Derby Tapes and through their participation in conventions and workshops, they encouraged Emdeko [74] distributors to adopt selling techniques which, without question, were designed to deceive their customers in several respects. Inclusion of Messrs. Wanlass and Gilson in the order is more than justified because of their participation in the illegal practices described above and the possibility that, otherwise, they might evade the order by using the same illegal selling techniques in their individual capacities. See *Steven Rizzi* [1973-76 Transfer Binder] Trade Reg. Rep. ¶ 20,862 (Feb. 25, 1975 [85 F.T.C. 274]); *Travel King, Inc.* [1973-76 Transfer Binder] Trade Reg. Rep. ¶ 21,024 (Sept. 30, 1975 [86 F.T.C. 715]).

C. *Summary*

1. The Commission has jurisdiction over the acts and practices of all respondents.
2. Several Emdeko distributors have made the following representations:

a. That their customers are specially selected.
b. That a survey is being conducted.

3. The above representations were not true and were and are deceptive.
4. Several Emdeko distributors have failed to disclose to their customers that a sales presentation would be made.
5. Several Emdeko distributors have used high pressure tactics during sales presentations.
6. The failure to disclose that a sales presentation would be made and the use of high pressure sales tactics was and is deceptive.
7. Respondents have encouraged Emdeko distributors to adopt the deceptive practices described above and have furnished them

with the means and instrumentalities whereby they have deceived their customers as described above.

8. Therefore, respondents have violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

9. The public interest requires that the order issued in Dkt. 8733 be, and it hereby is, reopened, altered and modified.

[75] 10. The public interest requires that the following order be, and it hereby is, entered in Dkts. 8733 and 8973.

ORDER

It is ordered, That respondents Emdeko International, Inc., its successors and assigns, and its officers, and Anthony J. Wanlass and Edward J. Gilson, individually and as officers of said corporation (hereinafter referred to collectively as "respondents"), and respondents' agents, representatives, and employees, directly or through National Housewares, Inc., or any other corporation, subsidiary, division or other device, in connection with the offering for sale, sale or distribution of any products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do each forthwith cease and desist from:

1. Representing orally, in writing, or in any other manner, directly or by implication:

a. That prospective customers have been selected, unless the method of and basis for selection is clearly, conspicuously, and truthfully disclosed to prospective customers in immediate conjunction with such representation.

b. That respondents are conducting a survey, gathering marketing information, or would like information about a consumer's [76] financial position, employment, marital status, age, or other personal matters, unless immediately prior to making each such representation, the following disclosure is made *verbatim:*

> WE WOULD LIKE TO ASK YOU SOME QUESTIONS SO THAT WE MAY DETERMINE WHETHER TO OFFER YOU AN OPPORTUNITY TO ATTEND A SALES PRESENTATION CONCERNING OUR PRODUCTS.

Each word of such verbatim disclosure shall be at least as conspicuous and emphatic as the most conspicuous and emphatic word in said contact.

2. Failing to disclose the following *verbatim* within the first fifty words of all contacts with consumers, orally or in writing, either by mail, telephone, in person, or by any other means:

WE WOULD LIKE TO HAVE THE OPPORTUNITY TO MAKE A SALES PRESENTATION TO YOU CONCERNING OUR PRODUCTS [OPTIONAL ADDITIONAL PHRASE:] PROVIDED THAT YOU MEET OUR CREDIT [AND/OR OTHER TRUTHFULLY STATED] QUALIFICATIONS.

Each word of such verbatim disclosure shall be at least as conspicuous and emphatic as the most conspicuous and emphatic word in the body of such contact.

3. Failing to present a card 3x5 inches in dimension with all words in 10 point boldface type, with the following [77] information *verbatim*, and none others, in the indicated order, to each person whom respondents intend to engage in a sales presentation, immediately upon meeting each such person at the place where respondents or their distributors intend to engage such person in such sales presentation; to direct each such person to read the information contained on such card; and to provide each such person with an adequate opportunity to read the card before engaging such person in any sales solicitation:

(1) the name and permanent address of the firm;

(2) the name of the sales person, followed by the term "Sales Representative";

(3) the terminology: "The purpose of this meeting is to solicit the sale of [applicable product(s)].";

(4) the terminology: "If you have any questions or dissatisfaction with our methods of doing business, please telephone toll free [respondents' toll-free telephone number], or write to [respondents' address for consumer letters]."

4. Failing to maintain a toll-free telephone number for receipt of consumer complaints, comments, and inquiries concerning respondents' activities or the activities of their distributors, dealers, retailers or franchisees and a specifically designated address for receipt of written consumer [78] complaints, comments, and inquiries. This file shall be made available, at their request and upon reasonable advance notice, to representatives of the Federal Trade Commission during respondents' business hours.

It is further ordered, That respondents do each forthwith cease and desist from furnishing distributors, dealers, retailers or franchisees with any means, instrumentalities, directions, instructions or encouragement whereby the public may be misled or deceived as to any of the matters or things prohibited by this order.

It is further ordered, That respondents shall encourage all present and future Emdeko distributors, and all other distributors, dealers, retailers, or franchisees to whom respondents give advice with

respect to sales techniques, to use, in their sales presentations, the disclosures required of respondents in paragraphs 1b, 2 and 3 of this order.

It is further ordered, That the corporate respondent shall deliver, or cause to be delivered, a copy of this order to its distributors, dealers, retailers or franchisees.

It is further ordered, That the corporate respondent shall notify the Commission at least 30 days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence [79] of a successor corporation, the creation or dissolution of subsidiaries or any other change in said corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the corporate respondent shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That the individual respondents named herein shall promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include such respondents' current business address and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

It is further ordered, That respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

OPINION OF THE COMMISSION

BY COLLIER, *Commissioner:*

[2] Emdeko International, Inc. ("Emdeko"[1]) is the survivor corporation to a business that was organized in the early 1960's by (and took its name from) *E*asy Pipella, *M*ike Pipella, *D*ave Bigler, *E*ddie Gilson,[2] *K*eith Bigler, and *O*wen Bigler (Tr. 549, 2133).[3] These

[1] The original corporation was named National Housewares, Inc. (F. 2.) In 1969, National was merged into Emdeko and became a division. (F. 3.) For purposes of this opinion, Emdeko refers to the extant corporation as well as its predecessors, divisions, and subsidiaries. (See F. 6.)

Also for purposes of this opinion, the following abbreviations will be used as needed: Tr. (Transcript), F. (Finding of the Administrative Law Judge), CX (Complaint Counsel's Exhibit), RX (Respondents' Exhibit), CAB (Complaint Counsel's Appeal Brief), and RAB (Respondents' Appeal Brief).

[2] Edward J. Gilson is also a respondent in this proceeding.

[3] Respondents' counsel notes that Easy and Michael Pipella and David and Keith Bigler are no longer affiliated with Emdeko. (RAB 7.) The evidence indicates, however, that they were thus affiliated through the 1960's and into the 1970's. (CX 345, CX 347, CX 455, CX 459, CX 460, Tr. 560-62, 565-66, 568, 2131-32, 2137, 2142, 2153-54.) Both they and Mr. Gilson were parties to the 1968 consent order discussed below at pages 24-26.

founders of Emdeko separately owned and operated three retail establishments in Montana, Utah, and California. (Tr. 2134.) Emdeko was primarily a wholesaler: it purchased household products from manufacturers and resold them to retailers. (F. 6.)[4] Throughout the relevant period, the great bulk of Emdeko's sales were to its distributors. (F. 14.)

Over the years, Emdeko's retail distribution system grew from three distributors in 1961 to 200 in 1970, but by the time of trial it had receded to 34. (F. 14.) As a general rule, the distributorships were independent businesses in the sense that Emdeko did not own them. (F. 10.) Distributors paid their own expenses and derived their revenues from retail sales of Emdeko products. (F. 14.) At the same time, Emdeko usually selected its distributors from the ranks of salesmen who worked for existing distributors. (Fs. 60, 78, 80, 95, Tr. 2146-2147.) Various directors, officers, and employees of Emdeko owned, operated, or worked for distributorships before, during, or after their affiliation with Emdeko. (*Id.*, Fs. 56, 80.) Emdeko itself owned a distributorship. (Tr. 560-66, 2296.)

[3] The selling techniques of Emdeko distributors are remarkably consistent throughout the country and have been for a substantial period of time.[5] (Fs. 49, 182.) They ply the so-called in-office "package" sales technique which is at the heart of the case. Its broad outlines, as well as its details, are graphically revealed in the exhaustive testimony of consumers, distributors, and Emdeko personnel and in the multitude of documentary exhibits[6] that comprise the record. The picture that emerges from the entire record is best viewed from the perspective of the consumer.

Typically, the consumer is first contacted at home either by telephone or by direct mail. (Fs. 27, 28, 32, 34, 53, 66, 78, 81, 84, 87, 91, 92, 98, 102, 106, 113, 120, 128, 134, 140, 149, 155, 162, 169, 174.) Telephone calls are disguised as survey questionnaires: consumers are asked to cooperate in answering a handful of questions about the products they use in their home and a few personal questions about their financial, employment, and marital status. (Fs. 28-30, 53, 92,

[4] Emdeko's activities include manufacturing some of the products that it wholesales to distributors and others. (F. 6.)

[5] The ALJ concluded quite correctly that the basic similarity in sales methods gave rise to an inference that Emdeko was responsible for these sales practices. *Cf Standard Educators, Inc.* v. *FTC*, 475 F.2d 401, 402 (D.C. Cir. 1973: "The Commission does not engage in speculation when it rejects the conclusion that these similarities occurred purely by coincidence and instead infers that they were the result of direction from above."

[6] Of particular interest are the numerous documents that Emdeko sent its distributors. These materials included detailed advice on operating a distributorship. Among them are CX 7 (script for telephone personnel); CX 10 (manual for conducting sales meetings); CX 17-20 (transcripts of the "Derby Winner Tapes" containing detailed tips on sales presentations); CX 23-25 (forms of "letter authorizations" used in the sales presentation); CX 350 and 351 (comprehensive manuals containing detailed advice on all aspects of creating and operating a distributorship); CX 367, 454, and 562 (scripts for salesmen). See Fs. 50, 57, 59, 61, 76, 77, 79-82, 84, 87, 92, 93.

140, 169, 174.) They are then told that they will be receiving a gift in gratitude for their cooperation and that they should watch their mail. Within days, the cooperating consumer receives a letter which explains that he is entitled to one of several enumerated gifts (the specific gift is undisclosed) and that to claim it he must call to arrange for an appointment. (Fs. 31, 81, 88, 106, 113, 120, 128, 134, 140, 149, 169, 174.)

[4] The direct mail solicitation alternative skips the telephone questionnaire. The consumer is congratulated by letter on the fact that he is entitled to a free gift. He is informed that he should call to arrange for an appointment to pick it up. (Fs. 31, 32, 66, 81, 84, 87, 98, 106, 113, 120, 149, 155, 162.)

Emdeko and its distributors refer to these telephone and letter contacts as "lead systems." The record contains detailed descriptions of the operation of lead systems that were published and disseminated by Emdeko to its distributors, including verbatim transcripts for "telephone girls" and samples of letters. (Fs. 26-35, 50, 57, 59, 61, 76, 77, 81, 82, 87, 92.)

When the consumer calls for an appointment to pick up his gift,[7] he is assigned a convenient time, given directions to the distributor's office, and asked to bring his spouse.[8] If he asks what is involved, he is told that he is entitled to a gift and is under no obligations. If he asks why, he is told that his opinions will be sought and the gift is for his time. (F. 33.) Once again, Emdeko supplied distributors with detailed suggestions for these telephone operations, including verbatim scripts. (See Fs. 15, 29-33.)

When the consumer arrives at the distributor's office he is greeted by a receptionist. (Fs. 39, 99, 103, 107.) He is told that a "supervisor" or "counselor" will be with him shortly (Fs. 67, 107; CX 351, p. 15) and he is invited to browse around a room where samples of Emdeko products are displayed. (Fs. 53, 99, 103, 141, 156, 164.) It is not apparent to the eye that these products are for sale: they do not have price tags or other price markings and they are visible in single units rather than on stocked shelves. (F. 103; CX 350, pp. 5A-5B.) Emdeko, once again, supplied distributors with suggested layouts and floor plans for displaying products. (F. 15; CX 350, p. 3.)

[5] In many cases, consumers were also asked by the receptionist to view one or more movies that touted the qualities of Emdeko products or Emdeko itself.[9] Among the movies were ones narrated by

[7] In some cases, calls to arrange appointments are initiated by distributors to persons who have previously received letters but who have not called the distributor. (Fs. 32-33.)

[8] Consumers who are poor sales prospects are not given appointments. (Fs. 27, 184.)

[9] The descriptions of Emdeko were apparently vague and did not explain the selling techniques to which the consumer was about to be subjected. Respondents referred to them as "image films." (CX 17.)

Audie Murphy and Art Linkletter. (Fs. 53, 99, 103, 107, 114, 129, 135, 141, 156, 164.)

Minutes later the "supervisor/representative" arrives, greets the consumer, and invites him and his spouse into an office. (Fs. 107, 121, 129, 136, 141, 150, 156, 164, 170, 175.) After introductions and some small talk all are seated and the representative announces that he is going to do several things.

The first is to present the promised — and as yet unidentified — gift. The presentation is often made immediately thereafter; although in some cases, the gift's identity is revealed and the actual presentation is deferred until the representative finishes his oral presentation. (Fs. 54, 88, 99, 103, 107, 122, 131, 142, 150, 157, 164, 172, 175.) The gifts vary from distributor to distributor and from time to time but consist of such items as steak knives (Fs. 99, 103, 137), portable barbeque grills (F. 172), vacations (*i.e.*, hotel accommodations but not transportation) to distant cities (Fs. 107, 114, 122, 153), perfume (Fs. 67, 172), cases of canned soup (Fs. 128, 134), cordless electric scissors (F. 142), or carving sets (Fs. 67, 107, 157, 164, 178.)

The second benefit announced by the representative is to enroll the consumer in a bonus or sweepstakes contest, (Fs. 44, 54, 69, 99, 104, 143, 157, 164.) after which the consumer is asked to select from among a range of potential prizes. (Fs. 39, 143, 164.) He is presented with brochures depicting different products and describing their characteristics. (Fs. 109, 116, 123, 129, 136, 150, 158, 170, 175.) These products, which are the same as those on display outside the representative's office, are then "sizzled," that is, the representative extols their characteristics. (Fs. 39, 69.)

During this product-by-product review the consumer and his spouse are asked several questions: Would they use the product in their home? Which would they each like to have most of all? What do they regard as the most important characteristics of the product? (Fs. 63, 89, 116, 129, 136, 150, 158, 170.) The net effect of these questions is to [6] reinforce the earlier impression that the consumer's advice is being solicited as part of a market research program. (Fs. 65, 87, 115, 120, 129, 136, 151, 166, 170.) Sometimes the inference is made explicit: the consumer is told that a conventional retail store may soon be opened (Fs. 69, 168) or that a consumer attitude survey is being conducted to provide feedback to Emdeko about the products.

During this dialogue, the representative records the consumer's reactions on a printed worksheet. (Fs. 40, 42, 70, 109, 170.) Among the questions are ones that call on the consumer to estimate the prevailing retail prices for comparable products at local stores. (Fs.

40, 63, 109, 116, 123, 143, 150, 159, 170.) These estimates are also recorded on the worksheet unless the guesses are too low. In that case, the representative suggests a higher price and the estimate is "corrected" upward by reference to specific prices at conventional, well-established, retail stores. (Fs. 40, 116, 159.)

Two classes of products are reviewed in this manner: so-called "majors" and "minors." (F. 36.) Major products consist of fire alarm systems, sewing machines, stereo sets, auto stabilizers, and similar items. Minor products consist of small household appliances.

Once again, Emdeko's support to the distributors' conduct is substantial. It supplies the products, the promotion literature, forms of worksheets, and advice on obtaining comparable prices from local retailers. (F. 15.) More importantly, it supplies distributors with verbatim scripts to be read by "supervisors/representatives" (F. 15) and consumers testified that the representatives often read from such scripts word-for-word or recited them from memory. (Fs. 37, 60, 69, 80, 85, 99, 121, 154, 157, 166, 175.)

After the presentation of major and minor products, the consumer is shown copies of testimonial letters written by ostensibly satisfied users of Emdeko products. (F. 41.) The consumer is asked whether he would be willing to write similar letters that would be used in advertising and promoting the products among his neighbors. (Fs. 41, 54, 63, 64, 69, 100, 110, 117, 124, 129, 136, 144, 151, 160, 166, 170, 176.) An affirmative response is followed by a request that the consumer sign a release form. (Fs. 71, 137, 167.) According to the evidence, the release or authorization form serves another less apparent purpose: it breaks down the consumer's resistance to signing his name. (Tr. 1077.)

[7] This tactic is important to what follows: The "close." (Fs. 39, 42-48.) Following an explanation of the testimonial letter program, the consumer is presented with an offer. If he agrees to write letters, he can take home several of the products — both major and minor — not for the total of the prices that had previously been estimated, but for a fraction of that total. Thus, the term "package selling." (Fs. 36, 72, 118, 151.)

The record is replete with the vivid details of these transactions which typically last from one to two hours. (Fs. 54, 69, 104, 133, 139, 148, 153, 161, 178.) There is also ample evidence that the "close" is sometimes attended by high pressure tactics (Fs. 73, 101, 111, 112, 119, 152, 159, 161, 168, 177, 199-200) designed to overcome the consumer's resistance to paying $400 to $800 for the products. (F. 36.)

The record also reflects various sporadic actions by Emdeko to caution its distributors against engaging in blatant deceptions.[10] (*E.g.*, F. 207; CX 350, pp. 1, 7, 8, 32, 55; CX 351, p. 23; CX 354.) These occasional warnings to distributors to eschew some unlawful practices either were insufficient to achieve their ostensible purpose or did not comprehend the fundamental illegality of the package method of selling that is revealed on the record.

Emdeko's basic in-office package sales scheme, as revealed by this record, is designed to collar consumers under misleading circumstances, strip their defenses, and cut off their options to search for substitute sources of products to fulfill their newly developed desires. The recommended procedures for selecting prospective consumers complement these objectives.[11] Neither Emdeko nor its [8] distributors are significantly constrained by the prospects of consumer dissatisfaction[12]; the capital investment to establish a distributorship is not significant.[13] Space and furniture can be rented and Emdeko supplies distributors with products, sales aids and printed materials, and technical business assistance.[14]

From the initial lead system contact throughout the supervisor/representative *cum* salesman's presentation, and until the close, the consumer is carefully led to believe that he is not the target of a sales pitch. (Fs. 186, 187, 194-197.) References to sales presentations are avoided or evaded until the offer is sprung. (Fs. 31, 33, 35, 45-46, 55, 61, 65, 67, 74, 81, 85, 100, 105, 110, 118, 128, 130, 137, 138, 144, 148, 151, 159, 166, 187.) And until then, the impression is carefully created that the products or some of them would either be given away (*e.g.*, the initial gift and the bonus or sweepstakes contest) or that they would be supplied as part of a research, promotional, or advertising program (*e.g.*, the telephone survey, the worksheets, the testimonial letter program).

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[10] Even these admonitions, however, lose their force in the face of the attitude, communicated by "Bulletin #112" to "Distributors" from Mr. Swanson, an area director: "Make sure that all written materials conform to our National Code of Ethics. You may have salesmen make a verbal error occasionally. This is a hard matter to prove. Proof of a wrongdoing is easy to prove when it is in writing." (CX 35.)

[11] The one to two hour long sales harangue is costly to both consumers and distributors, so care is recommended in selecting out certain classes of individuals. Distributors were advised to collect information on creditworthiness at the outset to improve the prospects that financing would ultimately be available. (Fs. 35, 184, 188.) In addition, of course, wary individuals insulate themselves from the distributor by declining to be lured by the gift offer.

[12] Emdeko materials reveal concern with "remorses." These are consumers who are so unhappy with the products that they purchased or with the sales experience that they seek to cancel the sales agreement. This reaction may lead to refusals to pay the finance company, eventually jeopardizing the distributor's source of consumer credit. Emdeko advised its distributors: "No remorse customers should ever talk directly to a salesman. The salesman will try to save his deal at any cost and it may cost you as a distributor, financing or worse yet, your entire business. It has happened." (CX 8, p. 16.) Emdeko assisted distributors in obtaining financing. (F. 17.)

[13] The record reveals that a distributorship may be established for a few thousand dollars. (Tr. 815-818, F. 84.)

[14] The technical assistance consisted of such far ranging activities as visits by area directors, advice on hiring and firing, recommendations on how to lay out an office, suggestions and other assistance on getting financing for consumer sales, and tips on buttering up local better business bureaus. (Fs. 15-17; CX 350.)

[9] We hold that this method of selling by which a consumer is led to believe that he is not the target of a sales presentation when in fact he is, is an unfair and deceptive practice and is prohibited by Section 5 of the Federal Trade Commission Act.

The principal dispute presented by this appeal is not with the findings or conclusions that establish the existence of these sales techniques and their illegality, but rather with complaint counsel's contention that respondents should be held to account for these practices. Emdeko, Gilson, and Wanless all seek refuge behind the independence of Emdeko's distributorships.

The complaint charged that Emdeko possessed the inherent authority to control the acts of its distributors and that it did control those acts. It also charged that Emdeko encouraged, facilitated, implemented and furnished the means, instrumentalities, services and facilities for, and condoned, approved, and accepted the benefits derived from the allegedly illegal practices. The Administrative Law Judge found that Emdeko did not control its distributors. (Fs. 20, 21, 180, 181.) This finding is supported by the unchallenged testimony of numerous distributors and Emdeko personnel. In the face of evidence that Emdeko did not own distributors, did not finance their operations, did not hire or fire their personnel, and did not manage their daily affairs, complaint counsel virtually abandoned the control theory. We therefore do not need to delve further into the question of what kind of showing, if any, would overcome this evidence of lack of control.

The ALJ also declined to hold Emdeko responsible for its distributors' acts solely on the theory of "inherent authority" to control arising out of the supplier-customer relationship. We concur in this conclusion. Complaint counsel cites no direct authority for this theory of per se vicarious liability, and we have found none. Conceding that such a holding would "extend" the law, complaint counsel places great weight on recent developments in the allegedly analogous areas of products liability,[15] Robinson-Patman [10] Act liability,[16] and various consumer protection statutes.[17] We find these arguments unpersuasive.

Complaint counsel's reliance on recent developments in the law of torts extending the zone of liability of a manufacturer of products for the quality and safety of those products is misplaced. These developments in so-called products liability law[18] have proceeded on

[15] See *McPherson* v. *Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916) and its progeny.

[16] *FTC* v. *Fred Meyer, Inc.*, 390 U.S. 341 (1968). *Cf. Abbott Laboratories* v. *Portland Retail Druggists Ass'n.*, 425 U.S. 1 (1976).

[17] *E.g.*, Fair Packaging and Labeling Act, 15 U.S.C. 1451, *et seq.*

[18] Complaint counsel cite W. Prosser, The Assault Upon the Citadel, 69 Yale L. J. 1099 (1960).

the reasonable premise that manufacturers are best situated to avert the undue economic and personal risks caused by defective products. Whatever the merits of this assumption, no similar assumption can be made about the risk avoidance capacities of suppliers for the marketing practices of their customers.

Complaint counsel's theory of per se liability of suppliers for the acts of their customers goes well beyond the recognized exceptions to the general rule of law that a person is not liable for the acts of another. Liability, as complaint counsel suggests, is a means of allocating risks of injury to those who are in a position to deal with them efficiently.[19] It is argued in a conclusory fashion that suppliers should bear the risks for the unfair or deceptive acts of their customers because this system of liability would assure maximum compliance with the law. Such a rule would enlist an army of supplier-regulators to police the conduct of countless customers. To an agency charged with enforcing compliance with statutory legal standards, all of this potential assistance is an attractive prospect. It would make our tasks considerably easier. The advantages of such a rule are readily apparent.

The disadvantages, however, could be great. The costs such a rule would impose upon suppliers would ultimately be shouldered by consumers. It is not at all clear that [11] suppliers are universally or even generally in a superior position to minimize the risks of misbehavior toward consumers or to police potential violators.[20]

While we do not foreclose the possibility that a different rule of liability might be appropriate in another particular context, the questions raised by a per se rule are not adequately addressed on this record and we decline to adopt complaint counsel's theory. Moreover, we have not lost sight of the fact that suppliers and customers may enter contractual agreements that protect the supplier's reputation from the misconduct of his customers. *See Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, —— U.S. ——, n. 23 (June 25, 1977). But the freedom to enter such contracts without condemnation under the antitrust laws is not a sufficient reason for imposing these obligations on suppliers as a matter of law.[21]

The failure of complaint counsel's per se theory does not end the

[19] R. Posner, Economic Analysis of Law, § 4.14 (1972).

[20] By contrast, the Commission concluded in connection with its trade regulation rule on Preservation of Consumers' Claims and Defenses, that consumer credit lenders usually possess superior capacity to assess the honesty of sellers with whom they deal frequently than do consumers of those sellers whose dealings are episodic. 40 F.R. 53506, 53509, 53514-15 (Nov. 18, 1975). One basis for this superior vantage point is the lender's experience in attempting to collect on debts of dissatisfied consumers.

[21] Complaint counsel's reliance on *FTC* v. *Fred Meyer, Inc.*, 390 U.S. 341 (1968) is misplaced for the same reason. Moreover, Congress has imposed express obligations on suppliers with regard to their marketing activities under the Robinson-Patman Act.

inquiry. The complaint charged that Emdeko encouraged, facilitated, implemented and furnished the means for the illegal conduct and that it shared in the fruits of these practices. That Emdeko's fortunes were linked to the successes or failures of its distributors is inherent in the supplier-customer relationship. But the allegation goes further: it charges Emdeko with active involvement in its distributors' illegal conduct.

The ALJ found that the illegal practices were a direct result of Emdeko's influence and the distributors' enthusiastic adoption of the package sales method which, in turn, encouraged consumer deception. (F. 182.) He found that [12] this influence began with the teachings of Emdeko personnel. (F. 183.) He further found that Emdeko advised and encouraged distributors to use deceptive sales practices. (Id.) Respondents knew of and approved this conduct. (Fs. 15-24, 38, 62, 75, 94, 205, 208.) The ALJ found that Emdeko distributed numerous materials and information which both recommended the method and provided important tools for its use. (Fs. 15, 26-35, 50, 57, 59, 61, 76, 77, 79, 80, 81, 82, 84, 87, 92, 93, 194.)[22] Finally he found that Emdeko was responsible for the illegal activities of its distributors because it developed a sales technique which encourages its practitioners to deceive consumers. (F. 208.)

These and other findings squarely supported by the preponderance of the evidence clearly establish Emdeko's liability under Section 5 for the unfair and deceptive treatment that consumers received. The evidence and the ALJ's findings establish that Emdeko developed and refined the package selling scheme (Fs. 36-37); actively and enthusiastically promoted its adoption by distributors (Fs. 38, 205); produced and distributed the written materials that supported its use (F. 15); promoted, encouraged, and subsidized the cross-fertilization of ideas among salesmen and distributors to improve the efficacy of the sales methods (Fs. 16-20, 25, 38); observed occasional sales presentations by distributors' salesmen (F. 17, 75); and paved the way for potential distributors to receive training in these sales methods prior to entering the package business (Fs. 60, 78, 79, 80, 84, 86, 95.)[23]

[13] Emdeko's liability under Section 5 is closely akin to the

[22] Liability under the FTC Act for supporting an unlawful scheme rests on a well-settled principle. Its familiar formulation has often been repeated by the courts and applied in various analogous contexts: "One who places in the hands of another a means of consummating a fraud or competing unfairly in violation of the Federal Trade Commission Act is himself guilty of a violation of that Act." *Regina Corp.* v. *FTC*, 322 F.2d 765, 768 (3d Cir. 1963). See, *e.g.*, *FTC* v. *Winsted Hosiery Co.*, 258 U.S. 483, 494 (1922); *Benrus Watch Co.* v. *FTC*, 352 F.2d 313, 318 (8th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966); *Surf Sales Co.* v. *FTC*, 259 F.2d 744, 746 (7th Cir. 1958); *Goodman* v. *FTC*, 244 F.2d 584, 591-92 (9th Cir. 1957); *C. Howard Hunt Pen Co.* v. *FTC*, 197 F.2d 273, 281 (3d Cir. 1952).

[23] New distributors usually were drawn from among the employees of established distributors. In the words of respondent Wanlass, "So, it was monkey see, monkey do." Tr. 2234. See Tr. 1437-1447, 1474-1476.

liability of a contributing tortfeasor. The principle is succinctly stated by the authors of the Réstatement: "For harm resulting to a third person from the tortious conduct of another, a person is liable if he knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself." Restatement of Torts, § 876.[24] In the context of the FTC Act, respondents must be presumed to know the legal requirements of Section 5, and in any event, there is ample evidence that they were well aware both of their distributors' conduct and of its unlawful character. (Fs. 205-206.)

Emdeko next argues that if its conduct with respect to its distributors is deemed objectionable it should only be ordered to cease and desist from repeating those very same transgressions in the future. Sympathetic to that argument, the ALJ has recommended an order provision to which respondents do not object, prohibiting them from "furnishing distributors . . . with any means, instrumentalities, directions, instructions or encouragement whereby the public may be misled or deceived . . ." and ordering them to "encourage all . . . distributors to whom respondents give advice with respect to sales techniques, to use, in their sales presentations" certain enumerated affirmative disclosures.

Complaint counsel argue that the recommended order is inadequate to protect the public or prevent continuation of the illegal practices. We agree. The ALJ's proposed order would simply inhibit future expansion of Emdeko's deceptive sales methods. It would do nothing to assure that continuing injury to future consumers is prevented.

The Commission is empowered to prevent the use of unfair or deceptive practices by requiring offenders to cease and desist from using them. 15 U.S.C. 45(a)(6), 45(b). Countless decisions, many of which are cited by the parties, set forth the familiar formulations of the scope and limitations on our authority to fashion appropriate relief. The Commission enjoys considerable latitude as long as its order bears a "reasonable relation" to the violations. [14] *Jacob Siegel Co.* v. *FTC,* 327 U.S. 608 (1946).[25] With this guidance in mind,

[24] The general principle of law has been applied in varying contexts. See, *e.g., Warner & Co.* v. *Lilly & Co.,* 265 U.S. 526, 530-531 (1924); *Keel* v. *Hainline,* 331 P.2d 397 (Okla. 1958); *Jaffray* v. *Hill,* 191 N.E.2d 399 (Ill. App. 1963); *Perigoni* v. *McNiece,* 262 So.2d 407 (La. Ct. App. 1972). See also cases cited in note 22, p. 12 *supra.*

[25] There are a host of cases uttering the same fundamental test in varying factual contexts, sometimes affirming our orders and sometimes not. *E.g., FTC* v. *Colgate Palmolive Co.,* 380 U.S. 374, 392-95 (1965) (order enforced); *FTC* v. *Broch & Co.,* 368 U.S. 360, 363-68 (1962) (order enforced); *FTC* v. *Mandel Bros., Inc.,* 359 U.S. 385, 392-93 (1959) (order enforced as modified); *FTC* v. *National Lead Co.,* 352 U.S. 419 (1957) (order enforced); *FTC* v. *Ruberoid Co.,* 343 U.S. 470 (1952) (order enforced); *FTC* v. *Cement Institute,* 333 U.S. 683, 726-30 (1948) (order enforced); *Jacob Siegel Co.* v. *FTC,* 327 U.S. 608 (1946) (remanded); *Warner Lambert Co.* v. *FTC,* 562 F.2d 749 (D.C. Cir. 1977) (order enforced as modified); *Chrysler Corp.* v. *FTC,* 561 F.2d 357 (D.C. Cir. 1977) (order enforced as modified); *ITT Continental Baking Co.* v. *FTC,* 532 F.2d 207 (2d Cir. 1976) (order enforced as modified); *Fedders*

(Continued)

we proceed to the design of an appropriate order grounded in the record of this case.

The major shortcoming of the ALJ's proposed order is that it exonerates respondents from responsibility for the continuing effects of their misconduct.[26] Respondents argue that we are without power to order greater relief than the ALJ has recommended, but we are unwilling to concede that we must stand by and helplessly watch respondents continue to support a deceptive and unfair scheme which they developed, promoted, and perfected. As participants in sales practices that have been found to be illegal, respondents will be ordered to cease and desist from further participation in those and similar practices in the future. In short, the order we issue today will assure that respondents do not continue to support these practices to the prejudice of consumers.

[15] We have adopted those parts of the ALJ's recommended order that prohibit respondents from furnishing their customers with the means to mislead consumers, that direct Emdeko to deliver copies of the order to its customers, and that require the submission of specified reports. The order also prohibits respondents from promoting the use of, using, or assisting others in the use of "package selling." This prohibition includes selling products to those who engage in "package selling." The term "package selling" is defined by the order to cover the unlawful practices that are revealed on this record.

These practices include soliciting consumers to attend a sales presentation by telephone, mail, or other direct communication or by offering a gift or a chance to receive a gift unless consumers are expressly and simultaneously told that they will be subjected to a sales presentation and unless they are given an opportunity within three days to cancel the purchase. Package selling also includes the sale of three or more unrelated products for a single price in the absence of the same disclosure and unless an opportunity to cancel the purchase is afforded. The term also includes any sales presentation accompanied by a representation that the consumer is participating in a survey, promotion, advertising program or any sales presentation attended by deceptive or misleading implications regarding the actual sales purpose of the contact. Under the order, respondents may escape liability if within 30 days of learning that

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Corp. v. *FTC*, 529 F.2d 1398 (2d Cir. 1976) (order enforced); *Spiegel, Inc.* v. *FTC*, 540 F.2d 287 (7th Cir. 1976) (order enforced as modified); *Beneficial Corp.* v. *FTC*, 542 F.2d 611 (3d Cir. 1976) (remanded); *National Dynamics Corp.* v. *FTC*, 492 F.2d 1333 (2d Cir.), *cert. denied*, 419 U.S. 993 (1974) (remanded); *L. G. Balfour Co.* v. *FTC*, 442 F.2d 1 (7th Cir. 1971) (order enforced as modified); *Windsor Distributing Co.* v. *FTC*, 437 F.2d 443 (3d Cir. 1971) (order enforced); *Tashof* v. *FTC*, 437 F.2d 707 (D.C. Cir. 1970) (order enforced).

[26] If and to the extent that the effects of respondents' misconduct dissipate with time, so too will their potential liability under the order we are issuing.

their customer has engaged in package selling they discontinue dealing with that customer for one year. To monitor compliance with these provisions we have included an expanded requirement for record retention and reporting of complaints received from consumers or law enforcement agencies.

The order that we are issuing is similar in its effects to both the original notice of contemplated relief and the order that complaint counsel has urged upon this appeal. In particular it prohibits respondents from continuing to supply products to customers who engage in unlawful sales practices. It also requires verbatim affirmative disclosures to consumers and cooling-off periods but only in those situations where consumers are exposed to a sales presentation on the heels of being solicited by a direct communication or with the promise of a gift. The order also requires a cooling-off period in connection with the sale of three or more unrelated products.

Respondents have objected to the requirement for affirmative disclosures to consumers upon each contact with them that the purpose of the contact is to make a sales presentation. The record indicates that Emdeko test-marketed this [16] requirement during the course of the proceeding and found that consumers who were advised that they would be the target of a sales pitch declined to subject themselves to it. (F. 27, Tr. 2297.) Respondent argues on appeal that this result flowed from the unreasonable requirement that the disclosure be made at every contact. But the testimony suggests that the information itself rather than its repetition was the cause of consumer disinterest. (Tr. 2297.)

This inference is buttressed by the statement of Errol Schenk, an Emdeko distributor's salesman who was denominated by Emdeko as a "Derby Winner": "If you tell a guy you're going to sell him, he ain't gonna buy . . . that's for sure." (F. 46.) It is also reinforced by Emdeko's own advice to distributors on how to discourage "rejects"[27] from accepting their invitations to pick up their free gifts. Telephone personnel (who are otherwise urged to conceal the purpose of the visit to the distributor's office in the course of arranging appointments) are told to tell rejects: "Did you read your letter over? O.K. Now what we are doing is selling all those products in your letter and we would like you to buy some of them . . . . Now, it does take about two hours of your time to talk to our salesman when you come in." (F. 35.)

If the record demonstrates anything, it demonstrates convincingly

[27] "Rejects" are those who receive letters offering free gifts but who are not regarded as good sales prospects. This group includes the retired, the laid off, bachelors, widows (not working), and widowers. (Fs. 27, 35.)

that a forthright and succinct statement of the salesman's intentions will be potent medicine for the deception and unfairness that inheres in the package-selling method. There is no question in our opinion that an affirmative disclosure requirement is reasonably related to the illegal practices. The major deceit of these practices was the concealment and misdirection perpetrated on consumers to avoid the inference or implication that a sales presentation would be attempted. Since the respondents' method of package selling possessed this fatal characteristic, we conclude that the affirmative disclosure is necessary to purge its illegality.

The added requirements that the disclosures be made in specified language and at each contact are equally necessary to prevent a recurrence of the illegal practices. Respondents and the distributors have apparently grown accustomed to Emdeko's providing specific scripts for use in package selling. Emdeko's own test marketing program of this [17] language (however unsuccessful from Emdeko's perspective) refutes any suggestion that this condition cannot be met. Similarly, the record fully supports the need for a disclosure at every contact. As promoted by respondents and practiced by their distributors, package selling sometimes involves numerous contacts with a consumer, sometimes several days apart and often attended by a lapse of memory by the consumer regarding the earlier contact. (F. 28, 31, 32, 174.) Repeating the disclosure will simply provide the sort of refresher information that the record indicates is warranted and that respondents themselves implicitly acknowledge is needed to entice the consumer to the local distributor's office.

The cooling-off requirement is manifestly necessary where, among other things, consumers are solicited by direct communication or gift offers or where several unrelated products are sold for a single price. These situations present conditions that are especially conducive to high pressure sales techniques[28] and that actually led to the exertion of such pressure on consumers in this case.

We agree with the ALJ that the order should prohibit respondents from engaging in certain enumerated practices in connection with retail sales even though retailing activities by Emdeko were not the subject of this litigation. This coverage is plainly necessary to prevent easy evasion of the primary prohibitions.[29] The record reflects the ease with which distributorships can be established. (Fs.

[28] Cooling-off relief is an established remedy to combat high pressure selling. See, *e.g.*, Cooling-Off Period for Door-to-Door Sales, 37 F.R. 22934 (Oct. 26, 1972), codified at 16 C.F.R. 429.

[29] This case is factually distinguishable from those in which no such possibility of evasion was present but where, instead, the Commission's order attempted to reach entirely different kinds of practices than those that were found to be unlawful. See, *e.g.*, *Chrysler Corp.* v. *FTC*, 561 F.2d 357 (D.C. Cir. 1977); ITT *Continental Baking Co.* v. *FTC*, 532 F.2d 207 (2d Cir. 1976).

56, 80, 84, 86.) It also reveals instances where Emdeko or its officers owned distributorships. (Tr. 560-566, 2134, 2296-97.) In addition, distributors and their employees graduated to become Emdeko employees. (Fs. 56, 80, Tr. 1555-1563.) Against this background, there is nothing to suggest that respondents could not easily become distributors in the [18] future, particularly if by doing so, the prohibitions of the order would be avoided. It is difficult to imagine a more apt occasion for exercising the Commission's authority to fence in the violator and prevent a recurrence of some variation on the old theme. *FTC* v. *Colgate Palmolive Co.*, 380 U.S. 374, 395 (1965); *FTC* v. *Mandel Bros., Inc.*, 359 U.S. 385, 392-93 (1959); *FTC* v. *National Lead Co.*, 352 U.S. 419, 428-29 (1957); *FTC* v. *Ruberoid Co.*, 343 U.S. 470 (1952).

Respondents raised an additional objection to the order sought by complaint counsel that would appear to be largely mooted by the approach we have adopted. Some portion of Emdeko's products have apparently been sold through a manufacturing subsidiary (Casady Engineering) to conventional, well-established retail stores. Presumably, however, these retailers do not engage in "package selling" as defined by the order. Accordingly, respondents' concerns that these relationships would be adversely affected by the order that we are issuing would appear to be without foundation.

Since this order is directed at terminating the future effects of respondents' misconduct, we have considered limiting portions of its duration to a fixed period of years. It might be argued, for example, that the effects of respondents' previous actions to promote their package sales system will eventually dissipate. A time limit was rejected for several reasons. First, Emdeko's package sales system has exhibited remarkable tenacity since being launched in the early 1960's. Second, the record shows that Emdeko's actions caused consumer injury at the hands of distributors, but it does not show that these effects have a predictable half-life. Finally, the Commission's procedures contain provisions for reopening and modification of final orders in the public interest.[30] If respondents can demonstrate at some time in the future that their transgressions have ceased to have their continuing effects, they may petition for appropriate relief.

Another argument made against the order is that the Commission should have proceeded directly against the offending distributors rather than against respondents. Although the principal thrust of this contention is adequately met by our holdings that respondents

[30] See below, pages 24-26.

themselves were active participants [19] in the illegal practices and that they are obliged to take the necessary steps to prevent a continuation or recurrence of these practices, we will deal with certain related contentions.

It is argued that the Commission should promulgate a trade regulation rule to check the misconduct of distributors.[31] Such a rule might serve a salutary purpose. It would expose future offenders to penalties and liability for consumer redress. See 15 U.S.C. 45(m), 57(b). But the trade regulation rule process is a costly and time consuming one. See 15 U.S.C. 57(a). And the Commission is not convinced that the practices engaged in by Emdeko distributors are either widespread among others or going to persist in the wake of the order we are issuing against the respondents whose conduct is the subject of this case.

The Commission has considered yet another means of deterring distributors from using unfair or deceptive practices. If challenged conduct has been found to be unlawful in a final determination of the Commission, then someone who engages in the condemned activity "with actual knowledge that such act or practice is unfair or deceptive and is unlawful under [Section 5]," is himself liable for civil penalties. Under this grant of statutory authority the Commission may choose at some time in the future to proceed for penalties against distributors or others who continue to engage in unlawful package selling.[32]

[20] To the extent that respondents would be ordered to avoid business dealings with distributors who engage in unlawful package selling, they argue that these proceedings are flawed by the failure to notify distributors of their pendency. The legal basis for this assertion is not entirely clear. For example, respondents do not and cannot claim that the order issued today would interfere with distributors' property rights.[33] The relationships between Emdeko and its distributors are unwritten, informal, and terminable at will. (F. 9.) Indeed, respondents' newly-discovered concern for their

[31] Tr. of oral argument, p. 48. Respondents do not argue that the Commission was required to proceed by rulemaking rather than adjudication. See *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 290-95 (1974). Such a claim could not be made out because a rule governing distributor conduct would not necessarily apply to respondents and because respondents have not established that previous longstanding and well-settled agency decisions condoned their practices causing reasonable reliance and unfair surprise, while subjecting them to sanctions that are not principally prospective in their effects.

[32] Such action would answer respondents' otherwise meritless argument that the order would place them at a competitive disadvantage in retaining or recruiting distributors who would take their business to other suppliers. Compare *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952); *Chrysler Corp.* v. *FTC*, 561 F.2d 357 (D.C. Cir. 1977); *Ford Motor Co.* v. *FTC*, 547 F.2d 954 (6th Cir. 1976); *Johnson Products Co.* v. *FTC*, 549 F.2d 35 (7th Cir.), *cert. denied*, ——— U.S. ——— (1977).

[33] Even if such a showing were made, it is doubtful whether the distributors would have been necessary parties to the proceeding. See *National Licorice Co.* v. *NLRB*, 309 U.S. 350, 365-66 (1940); *Pepsico, Inc.* v. *FTC*, 472 F.2d 179 (2d Cir. 1972), *cert. denied*, 414 U.S. 876 (1973).

distributors' interests rings hollowly against this background. Since the distributors were not parties to this proceeding they are not bound by the terms of the order or subject to the statutory sanctions that attend noncompliance with its terms.[34]

Neither have respondents shown how their own rights were prejudiced by the absence of notice to their distributors. Their liability in this case is based on their own conduct and the natural results of their actions. Moreover, many distributors were witnesses at the hearing, others were aware of these proceedings (see Tr. 17), and nothing prevented respondents from apprising the remainder of this litigation.[35]

[21] Respondents Gilson and Wanlass object to personal liability. The ALJ found that:

> Respondent Anthony J. Wanlass has been a vice-president of National since January 16, 1969 . . ., has been a vice-president of Emdeko since January 1, 1970 and has been a member of its board of directors since February 16, 1972 . . . . He was also a national area director for the western division of National in 1970 and 1971 . . ., is an officer of a number of Emdeko's subsidiaries, and is a minor owner of Emdeko stock (0.6 percent) . . . . (F. 4.)
>
> Respondent Edward Gilson became a vice-president of Emdeko and a member of its board of directors on February 26, 1970. He is now the president of Emdeko . . . . He is also an officer in several of Emdeko's divisions and subsidiaries . . . and has owned between 13 percent and 17 percent of the stock of National and Emdeko during the past several years . . . . (F. 5.)
>
> Mr. Wanlass, National's national sales director . . ., has conducted a series of motivational and instructional "workshops" for distributors . . . . In 1972, workshops for distributors were held in Dallas, Chicago, Atlanta, Philadelphia and San Francisco . . . . Mr. Wanlass participated in these and other meetings where lead systems and suggested sales presentations were discussed . . . . (F. 18.)
>
> Mr. Gilson, president of National . . ., also attended regional meetings and conventions at which lead systems and sales presentations were discussed . . . . He has assisted distributors in arranging for the purchase of their installment contracts by finance companies . . . and has visited distributors, offering advice about personnel matters, lead systems and sales presentations . . . . (F. 19.)

(Record references omitted.) In addition, the ALJ noted that Messrs. Gilson and Wanlass participated in the preparation and dissemina-

[34] As noted in the preceding paragraph of the text, distributors who continue to engage in certain unlawful sales practices may in the future face consequential penalties. But this potential liability is distinguishable from the liability that arises out of noncompliance with a cease and desist order. Cease and desist orders often contain detailed prohibitions, frequently requiring affirmative actions. Moreover, order compliance is an absolute obligation that does not require a showing of the defendant's state of mind.

[35] As a result of previous difficulties with a local law enforcement agency, Emdeko advised distributors of possible termination for engaging in prohibited practices. (CX 351, p. 23.)

tion of the Derby Winner Tapes which contained advice to distributors on perfecting unlawful sales methods. (Fs. 18, 19, 38, 46.)

[22] Court decisions affirming or denying liability under the FTC Act of natural persons for conduct performed in the name of the corporation are plentiful.[36] Numerous factors have been considered in individual cases, either separately or in combination.

Both the courts and the Commission[37] have looked to the unlawful practices involved,[38] the respondent's [23] involvement with the practices,[39] the type of corporate entity,[40] the respondent's ownership interest,[41] the corporate office (if any) held,[42] and the influence he exercised over corporate affairs.[43]

While it is unnecessary as a matter of law that a particular case replicate all of the conditions which have led the courts to uphold individual liability, there can be no doubt that respondents Wanlass and Gilson must bear personal responsibility for the unlawful practices that permeate this record. The unlawful practices we have found were widespread,[44] respondents Wanlass and Gilson were involved in the conception, performance and implementation of

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[36] *FTC* v. *Standard Education Society*, 302 U.S. 112 (1937) (individual liability affirmed); *Standard Educators, Inc.* v. *FTC*, 475 F.2d 401 (D.C. Cir.), *cert. denied*, 414 U.S. 828 (1973) (individual liability affirmed); *Dlutz* v. *FTC*, 406 F.2d 227 (3d Cir.), *cert. denied*, 395 U.S. 936 (1969) (individual liability affirmed); *Fred Meyer, Inc.* v. *FTC*, 359 F.2d 351, 367-368 (9th Cir.), *cert. denied*, 308 U.S. 908 (1967) (individual liability affirmed); *Flotill Products, Inc.* v. *FTC*, 358 F.2d 224, 233 (9th Cir. 1966) (individual liability reversed); *Doyle* v. *FTC*, 356 F.2d 381 (5th Cir. 1966) (individual liability reversed); *Benrus Watch Co.* v. *FTC*, 352 F.2d 313, 324-325 (8th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966) (individual liability affirmed); *Coro, Inc.* v. *FTC*, 338 F.2d 149 (1st. Cir. 1964) (individual liability reversed); *Rayex Corp.* v. *FTC*, 317 F.2d 290, 295 (2nd Cir. 1963) (liability affirmed as to one individual, reversed as to another); *Pati-Port, Inc.* v. *FTC*, 313 F.2d 103 (4th Cir. 1963) (individual liability affirmed); *Surf Sales Co.* v. *FTC*, 259 F.2d 744, 747 (7th Cir. 1958) (individual liability affirmed); *Tractor Training Service* v. *FTC*, 227 F.2d 420, 425 (9th Cir. 1955) (individual liability affirmed); *Standard Distributors, Inc.* v. *FTC*, 211 F.2d 7, 13-16 (2nd Cir. 1954) (individual liability affirmed); *Steelco Stainless Steel, Inc.* v. *FTC*, 187 F.2d 693, 697 (7th Cir. 1951) (individual liability affirmed); *Consumers Home Equipment Co.* v. *FTC*, 164 F.2d 972, 973 (6th Cir. 1947) (individual liability affirmed); *Gelb* v. *FTC*, 144 F.2d 580, 581 (2d Cir. 1944) (individual liability affirmed); *Sebrone Co.* v. *FTC*, 135 F.2d 676, 677-678 (7th Cir. 1943) (individual liability affirmed).

[37] *See, e.g.*, Travel King, Inc., 86 F.T.C. 715, 776 (1975); Steven Rizzi, 85 F.T.C. 274, 305-306 (1975).

[38] *E.g.*, were the practices widespread? *See Standard Educators, Inc., supra* note 36.

[39] *E.g.*, did he conceive, perform, implement, control, supervise, authorize, approve, or know of the challenged conduct? *See Standard Educators, Inc.* v. *FTC*, *supra* note 36; *Dlutz* v. *FTC*, *supra* note 36; *Fred Meyer, Inc.* v. *FTC*, *supra* note 36; *Surf Sales Co.* v. *FTC*, *supra* note 36; *Tractor Training Service* v. *FTC*, *supra* note 36; *Standard Distributors, Inc.* v. *FTC*, *supra* note 36; *Steelco Stainless Steel, Inc.* v. *FTC*, *supra* note 36; *Gelb v. FTC*, *supra* note 36; Travel King, Inc., *supra* note 37.

[40] *E.g.*, was it closely held? *See Fred Meyer, Inc.* v. *FTC*, *supra* note 36; *Steelco Stainless Steel, Inc.* v. *FTC*, *supra* note 36.

[41] *See FTC* v. *Standard Education Society*, *supra* note 36; *Standard Educators, Inc.* v. *FTC*, *supra* note 36; *Dlutz* v. *FTC*, *supra* note 36; *Fred Meyer, Inc.* v. *FTC*, *supra* note 36; *Rayex Corp.* v. *FTC*, *supra* note 36; *Pati-Port, Inc.* v. *FTC*, *supra* note 36; *Tractor Training Service* v. *FTC*, *supra* note 36; *Steelco Stainless Steel, Inc.* v. *FTC*, *supra* note 36.

[42] The cases cited in notes 36 and 37 have involved — variously — "principals," presidents, board chairmen, directors, officers, organizers, managers, and employees.

[43] *E.g.*, did he direct, control, or formulate policies, either above or in combination with others? See *Benrus Watch Co.* v. *FTC*, *supra* note 36; *Coro, Inc.* v. *FTC*, *supra* note 36; *Surf Sales Co.* v. *FTC*, *supra* note 36; *Steelco Stainless Steel Co.* v. FTC, *supra* note 36; *Consumers Home Equipment Co.* v. *FTC*, *supra* note 36; *Gelb* v. *FTC*, *supra* note 36.

[44] F. 182.

Emdeko's acts, they authorized, approved, and knew of Emdeko's actions,[45] Emdeko was a closely held company,[46] [24] respondents possessed ownership in Emdeko, both men were officers and directors of the company,[47] and each of them directed, controlled, and formulated company policies.[48]

Respondents National Housewares and Edward Gilson object to these entire proceedings on still another theory. These respondents consented to a cease and desist order in 1968. As to them, the instant proceeding was commenced pursuant to 15 U.S.C. 45(b) which provides, in relevant part: "[T]he Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any . . . order . . . issued by it . . . whenever in the opinion of the Commission the public interest shall so require . . ." (Emphasis added.)[49]

The Commission's procedural rules provide for the commencement of a modification proceeding by issuance of an order to show cause. These orders explain the changes proposed in the outstanding cease and desist order. If no objection to the changes is registered the respondent is deemed to have consented to them. But if there are objections and if the pleadings raise "substantial factual issues," adjudicative proceedings are conducted. 16 CFR 3.72(b)(1) and (3). Such an adjudicative proceeding, of course, was conducted here.

When the show cause orders to National and Gilson were first served, these respondents raised numerous objections. Their arguments were rejected in detail by the Commission in a ruling of December 3, 1974, captioned "Order Overruling Respondents' Opposition to Order to Show Cause and Directing Hearings for the Receipt of Evidence."

[25] On this appeal, respondents argue that the adjudication that followed failed to produce allegedly necessary proof that the 1968 consent order inadequately remedied the pre-1968 alleged violations, that the respondents have continued to violate the FTC Act, and that the public interest required reopening, alteration and modification of the 1968 consent order.

We disagree with respondents' argument that the first or last of these issues posed factual disputes that needed to be resolved

[45] Fs. 18, 19, 38, 44, 46-48, 206, CX 553, 554.

[46] CX 459.

[47] Fs. 4, 5.

[48] See n. 45, *supra;* CX 185a; Tr. 599-601, 2143-44. We reject these respondents' apparent contention that they are absolved of personal liability because other individuals also participated in the preparation of Emdeko sales aids, because they denied in their testimony that they approved of certain unlawful conduct, or because they occasionally intervened on behalf of consumers who were involved in disputes with distributors.

[49] The Commission may issue an initial complaint if it has "reason to believe" that a violation has occurred and if a proceeding would be "to the interest of the public." 15 U.S.C. 45(b).

separately in the adjudicative proceeding. Of course, respondents' liability for violating the FTC Act had to be proved; and, as we have concluded, it was. The complaint adequately alleged such violations and there was a plenary hearing on those charges. The Commission's determination, however, that the 1968 order was no longer in the "public interest" was not an issue of fact that needed to be independently adjudicated.

The Commission's statutory authority to reopen an order is analagous to its authority to issue a complaint in the first instance. The latter action also requires a determination that the proceeding is in the public interest. But this determination, having once been made, is eventually subsumed by a later determination that a violation occurred and that a particular form of cease and desist order is required.[50] *FTC* v. *Klesner,* 280 U.S. 19 (1929); *Exposition Press, Inc.* v. *FTC,* 295 F.2d 869 (2d Cir. 1961), *cert. denied,* 370 U.S. 917 (1962); *Moretrench Corp.* v. *FTC,* 127 F.2d 792 (2d Cir. 1942); *Cf. Montgomery Ward & Co.* v. *FTC,* 379 F.2d 666, 672 (7th Cir. 1967); *Standard Distributors, Inc.* v. *FTC,* 211 F.2d 7, 13 (2d Cir. 1954); *Ford Motor Co.* v. *FTC,* 120 F.2d 175, 182 (6th Cir.), *cert. denied,* 314 U.S. 668 (1941). Many of the issues that may bear upon the Commission's determination of what the public interest requires are unsuited for adjudicative resolution. See, *e.g.,* Bristol-Myers Co., 85 F.T.C. 688, 746-747, 752-753 (1975). See generally 2 K. Davis, Administrative Law Treatise § 15.03 pp. 353-63 (1958).

Similarly, there was no need to direct the hearing at the policy and legal questions surrounding the "adequacy" of the 1968 order to correct either the allegations about pre-order conduct or respondents' compliance with its commands. It is not apparent what public purpose would be served by [26] such an inquiry or why such a pointless undertaking should be permitted or required by the FTC Act. Implicit in our conclusion that respondents committed unfair and deceptive practices and that a cease and desist order is needed to prevent their recurrence is an ample showing that the 1968 order is inadequate to the extent that it is not coextensive with today's order.

We have concluded that National's objections to the modification proceedings are without merit for an additional reason. National no longer exists as an independent entity; it became a division of Emdeko in 1969. While it is unnecessary to decide whether Emdeko's absorption of National subjected Emdeko to liability under the 1968 consent order,[51] it seems clear that the elimination of National

[50] Respondents do not and cannot argue that this action was initiated to resolve a private controversy or to challenge a trivial trade practice.

[51] The 1968 order omits the usual language binding successors to the respondents' business. But see *U.S.* v. *Van Raalte Co.,* 328 F. Supp. 827 (S.D.N.Y. 1971); ITT Continental Baking Co., 84 F.T.C. 1349 (1974). Although

(Continued)

cannot be allowed to create increased immunity from liability. If respondents' were correct in arguing that additional proof were needed to establish liability and support an order under a modification proceeding and if it were also to be held that a successor entity were entitled to the same privilege, the prohibitions of the statute could be evaded simply by acquiring companies that are subject to outdated or ineffective orders. Such an outcome would serve no conceivable statutory objective.

Respondents' objections to the procedures for reopening and modification are without merit.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of respondents and complaint counsel from the initial decision, and upon briefs and oral argument in support thereof and opposition thereto, and the Commission for the reasons stated in the accompanying Opinion having determined to sustain the initial decision with certain modifications:

[2] *It is ordered*, That the initial decision of the administrative law judge, pages 1-74, be adopted as the Findings of Fact and Conclusions of Law of the Commission, except to the extent modified or otherwise indicated in the accompanying Opinion.

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

It is further ordered, That the following order to cease and desist be, and it hereby is, entered:

ORDER

I

For purposes of this order the following definitions shall apply:

A. "Package selling" means:

(1) soliciting a consumer by telephone, mail, or other means of direct communication to attend a sales presentation; or

(2) offering a gift, premium, prize, coupon, or a chance to secure any of the above, in connection with a solicitation to attend a sales presentation; or

(3) representing that a survey or promotion is being undertaken, or that the consumer is invited to participate in an advertising or

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respondent Emdeko notes that "National Housewares . . . is now a division of Emdeko and would be covered by any order issued against Emdeko . . .," it has not argued that Emdeko is bound by the 1968 consent order issued against National. (RAB 7.)

promotional program, unless no offer of sale is made to the consumer to whom such representation is made; or

(4) using any artifice or device, to solicit a consumer for the purpose of making a sales presentation, which has a tendency or capacity to lead a consumer to conclude that there is any other reason for the contact with him; or

(5) offering or selling three or more unrelated products for a single price.

Provided, that package selling shall not include the use of any of the above practices by regular multi-line retail establishments, such as department stores. *Provided further,* that use of the practices enumerated in subparagraphs (1), (2), or (5) shall not constitute package selling if each solicitation, offer or sales presentation comprehended by such practices is immediately preceded by a clear and conspicuous disclosure and if a cooling-off period is given in connection with any sale that may follow.

[3] B. "Clear and conspicuous disclosure" means the statement "We would like the opportunity to sell our products to you," in print at least as large and prominent as the largest and most prominent used in any other portion of the written material with which it appears or, in oral presentations, in speech at least as clear and distinct as the most clear and distinct speech used in any other portion of the oral presentation with which it is given.

C. To give a "cooling-off period" means to fulfill all of the obligations established by 16 C.F.R. 429 as if the sale were a door-to-door sale, as defined by that part, whether it is or not.

D. "Encouraging or advising" includes providing sales materials, guidance, advice or other similar assistance.

E. "Assisting" includes providing products by sale, consignment or any other means of transfer.

F. "Sale," in any of its grammatical forms, includes leases and all other transfers of goods and services.

II

It is ordered, That respondents Emdeko International, Inc., a corporation, its successors and assigns, and its officers; Edward J. Gilson, individually and as an officer of said corporation; and Anthony J. Wanlass, individually and as an officer of said corporation; and the agents, representatives and employees of the foregoing respondents, directly or through any corporation, subsidiary, division or other device, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist in any manner from:

(1) encouraging or advising any other person to engage in package selling; or

(2) engaging in package selling; or

(3) assisting any other person to engage in package selling.

Provided, that it shall be a defense to a charge of assisting another in package selling in violation of this paragraph of the order if respondents establish that they ceased doing business for one year with a person engaged in package selling within thirty (30) days of first having knowledge that such person engaged in such conduct. [4]

III

It is further ordered, That the corporate respondent shall deliver, or cause to be delivered, a copy of this order to its divisions, distributors, dealers, retailers, and franchisees.

IV

It is further ordered, That respondents shall, for a period of five (5) years after receipt of consumer, Better Business Bureau, or consumer or law enforcement agency complaints, comments, and inquiries concerning respondents' activities or the activities of their distributors, dealers, retailers, or franchisees, retain records of all such complaints or inquiries, and copies of any written correspondence and complete summaries of telephone conversations relating thereto. These records shall be available, at their request and upon reasonable advance notice, to representatives of the Federal Trade Commission during respondents' regular business hours.

V

It is further ordered, That the corporate respondents shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the corporate respondents, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in said corporations which may affect compliance obligations arising out of the order.

VI

It is further ordered, That each individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. In addition, for a period of ten years from

the effective date of this order, the respondent shall promptly notify the Commission of each affiliation with a new business or employment. Each such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order. [5]

VII

It is further ordered, That respondents shall within sixty (60) days after service upon them of this order, file with the Federal Trade Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

PERPETUAL FEDERAL SAVINGS & LOAN ASSOCIATION

Docket 9083. Interlocutory Order, Nov. 25, 1977

Denial of motion for withdrawal or disqualification of Chairman Pertschuk from participation in the decision of this matter on ground of prejudgment.

ORDER DENYING MOTION TO DISQUALIFY

Respondent Perpetual Federal Savings & Loan Association on July 13, 1977, filed a motion asking alternatively that Chairman Pertschuk withdraw from participation in the decision of this matter or that he be disqualified. Respondent urged, as ground for the motion, that prejudgment of this case is evidenced by a letter sent by the Chairman to the Chairman of the Consumer Subcommittee of the Senate Committee on Commerce, Science and Transportation, in connection with the Subcommittee's consideration of legislation to exclude savings and loan associations from the Commission's jurisdiction.

By memorandum of September 15, 1977, Chairman Pertschuk dealt with the first branch of this motion, declining to withdraw and stating his reasons therefor. We have considered respondent's motion, complaint counsel's opposition, and Chairman Pertschuk's memorandum, and have determined that the motion for disqualification should be denied for the reasons stated by the Chairman.

In particular, none of the authorities cited by respondent stands for the proposition that a pre-existing view on issues of law (as distinct from fact) on the part of a Commissioner, the most that could be made out here, is a ground for disqualification. To adopt this proposition would be not only to require each Commissioner (or, presumably, each judge) to decide any particular issue of law only once in his or her tenure, but to put in question the whole principle of *stare decisis* on the basis of which our judicial system has evolved. If it were true that each litigant is entitled to appear before a decisionmaker devoid of preconceptions as to the law applicable to his case there would be no "law" in the sense that we understand it. That a decisionmaker forms a preconception on a novel issue of law out of an amalgam of rules applicable to analogous cases is no more offensive to this system than is reliance on a decision squarely in point.

It is therefore ordered, That respondent's motion be, and it hereby is, denied.

IN THE MATTER OF

CHRYSLER CORPORATION

MODIFIED ORDER, IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8995. Final Order, Apr. 13, 1976 — Modified Order, Dec. 5, 1977

This modified order to cease and desist replaces an earlier order issued on April 13, 1976, 41 FR 20653, 87 F.T.C. 719. In accordance with the decision and judgment rendered by the Court of Appeals for the District of Columbia on July 6, 1977, 561 F.2d 357 (1977), this order deletes Paragraphs 2 and 3 of the original order, which pertain to performance tests and results.

Appearances

For the Commission: *H. Robert Field, Carlton C. Eastlake* and *Richard Bloomfield.*

For the respondent: *Walter B. Maher* and *Hogan & Hartson,* Washington, D. C.

MODIFIED ORDER TO CEASE AND DESIST

Respondent having filed in the United States Court of Appeals for the District of Columbia on June 30, 1976, a petition to review an order to cease and desist issued on April 13, 1976 [87 F.T.C. 719]; and the Court having rendered its decision and judgment on July 6, 1977, affirming and enforcing the Commission's order with the deletion of Paragraphs 2 and 3, and respondent not having filed a petition for certiorari within the time permitted by law;

Now, therefore, it is hereby ordered, That the aforesaid order to cease and desist be, and it hereby is, modified in accordance with the decision and judgment of the Court to read as follows:

ORDER

It is ordered, That respondent Chrysler Corporation and its officers, representatives, and agents and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of products sold by the respondent in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, by reference to a test or tests, that any of respondent's automobiles are superior with

regard to fuel economy to any other automobiles whether manufactured by respondent or others unless:

a. such superiority has been demonstrated as to the model(s) for which it is claimed by such test or tests with respect to each sample, or the valid average of all identical samples, of each model represented to have been tested; or

b. the valid test results for each sample, or the valid average of all identical samples, of each model so compared, including the advertised model as well as such makes and models to which the advertised model is compared, are clearly and conspicuously disclosed.

For the purpose of this order, "sample" shall mean an actual automobile tested.

2. Misrepresenting in any manner the fuel economy of any automobile or the superiority of any automobile over competing products in terms of fuel economy.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondent notify the Commission at least 30 days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondent shall, within sixty (60) days after this order becomes "final," file with the Commission a report, in writing, setting forth in detail the manner and form of its compliance with this order.

IN THE MATTER OF

PERPETUAL FEDERAL SAVINGS & LOAN ASSOCIATION

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 9083. Complaint, May 13, 1976 — Final order, Dec. 6, 1977

This order, among other things, requires a Washington, D.C. savings and loan association to cease having as directors individuals who simultaneously serve, or may serve, as directors for the American Security and Trust Co., National Bank of Washington, Union First Bank of Washington, or any other competitive financial institution.

Appearances

For the Commission: *Roger J. McClure, Peter L. Feldman* and *Alan Proctor.*

For the respondent: *Samuel Scrivener, Jr., Scrivener, Parker, Scrivener & Clarke, Edward F. Howrey, A. Duncan Whitaker, John DeQ. Briggs, III* and *Raymond A. Jacobsen, Jr., Howrey & Simon,* all of Washington, D. C.

COMPLAINT

The Federal Trade Commission having reason to believe that the above-named respondent has violated Section 5 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the interest of the public, issues this complaint, stating its charges as follows:

PARAGRAPH 1. The following definitions apply in this complaint:

(a) "Residential loans" are loans secured by mortgages or other liens on non-farm property containing 1–4 dwelling units.

(b) "Savings deposits" are deposits on which the "passbook" rate of interest or a lesser rate of interest is paid.

PAR. 2. Respondent Perpetual Federal Savings & Loan Association ("Perpetual") is a corporation organized and existing under and by virtue of the laws of the United States of America. It maintains its principal place of business at 500 11th St., N.W., Washington, D.C. Perpetual has capital, surplus and undivided profits aggregating more than $71 million. [2]

PAR. 3. American Security and Trust Company ("American Security") is a corporation organized and existing under and by virtue of the laws of the United States of America. It maintains its principal place of business at 15th and Pennsylvania Ave., N.W.,

Washington, D.C. American Security has capital, surplus and undivided profits aggregating more than $89 million.

PAR. 4. National Bank of Washington ("National Bank") is a corporation organized and existing under and by virtue of the laws of the United States of America. It maintains its principal place of business at 619 14th St., N.W., Washington, D.C. National Bank has capital, surplus and undivided profits aggregating more than $42 million.

PAR. 5. Joseph B. Danzansky is a member of the boards of directors of both Perpetual and National Bank. He has been a director of Perpetual since 1972 and of National Bank since 1969.

PAR. 6. Lloyd H. Elliott is a member of the boards of directors of both Perpetual and American Security. He has been a director of Perpetual since 1972 and of American Security since 1968.

PAR. 7. George M. Elsey is a member of the boards of directors of both Perpetual and American Security. He has been a director of Perpetual since 1973 and of American Security since 1971.

PAR. 8. William S. Harps is a member of the boards of directors of both Perpetual and National Bank. He has been a director of Perpetual since 1970 and of National Bank since 1971.

PAR. 9. Thornton W. Owen is chairman of the board of directors and chief executive officer of Perpetual, and is a member of the board of directors of American Security. He has been a director of Perpetual since 1939 and of American Security since 1947. Effective April 20, 1976, his status on the board of directors of American Security changed to that of director emeritus. [3]

PAR. 10. Jean H. Sisco is a member of the boards of directors of both Perpetual and National Bank. She has been a director of Perpetual since at least 1975 and of National Bank since April 1976.

PAR. 11. The business of Perpetual encompasses, but is not limited to, the solicitation and maintenance of savings deposits and the solicitation and financing of residential loans. As of April 30, 1975, Perpetual had savings deposits of more than $646 million and residential loans of more than $517 million. As of October 31, 1975, Perpetual had savings deposits of more than $676 million and residential loans of more than $568 million. Perpetual conducts its business at numerous locations, including 9 offices in the Washington, D.C., metropolitan area.

PAR. 12. The business of American Security encompasses, but is not limited to, the solicitation and maintenance of savings deposits and the solicitation and financing of residential loans. As of June 30, 1975, American Security had savings deposits of more than $188 million and residential loans of more than $77 million. As of

December 31, 1975, American Security had savings deposits of more than $189 million and residential loans of more than $79 million. American Security conducts its business at numerous locations, including 30 offices in the Washington, D.C., metropolitan area.

PAR. 13. The business of National Bank encompasses, but is not limited to, the solicitation and maintenance of savings deposits and the solicitation and financing of residential loans. As of June 30, 1975, National Bank had savings deposits of more than $96 million and residential loans of more than $39 million. As of December 31, 1975, National Bank had savings deposits of more than $101 million and residential loans of more than $42 million. National Bank conducts its business at numerous locations, including 24 offices in the Washington, D.C., metropolitan area. [4]

PAR. 14. (a) By the nature of their businesses and the locations of their operations as hereinabove described, Perpetual and American Security are competitors of each other, and Perpetual and National Bank are competitors of each other.

(b) The elimination, by agreement or otherwise, of competition between Perpetual and American Security or between Perpetual and National Bank would constitute a violation of the antitrust laws.

PAR. 15. (a) The boards of directors referred to in Paragraphs Five, Six, Seven, Eight, Nine and Ten hereof are elected, hold meetings, and perform their functions in the District of Columbia.

(b) Perpetual, American Security, and National Bank conduct their business, as hereinabove described, in the District of Columbia and in various States of the United States.

(c) Perpetual, American Security, and National Bank engage in "commerce" and conduct their business, including activities involving their boards of directors, so as to have an effect upon "commerce," as the term "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

PAR. 16. Joseph P. Danzansky's simultaneous membership on the boards of directors of both Perpetual and National Bank is an unfair act, practice, or method of competition in or affecting commerce and, therefore, constitutes a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by Perpetual.

PAR. 17. Lloyd H. Elliott's simultaneous membership on the boards of directors of both Perpetual and American Security is an unfair act, practice, or method of competition in or affecting commerce and, therefore, constitutes a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by Perpetual. [5]

PAR. 18. George M. Elsey's simultaneous membership on the boards of directors of both Perpetual and American Security is an

unfair act, practice, or method of competition in or affecting commerce and, therefore, constitutes a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by Perpetual.

PAR. 19. William S. Harps' simultaneous membership on the boards of directors of both Perpetual and National Bank is an unfair act, practice, or method of competition in or affecting commerce and, therefore, constitutes a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by Perpetual.

PAR. 20. Thornton W. Owen's simultaneous membership on the boards of directors of both Perpetual and American Security is an unfair act, practice, or method of competition in or affecting commerce and, therefore, constitutes a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by Perpetual.

PAR. 21. Jean H. Sisco's simultaneous membership on the boards of directors of both Perpetual and National Bank is an unfair act, practice, or method of competition in or affecting commerce and, therefore, constitutes a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by Perpetual.

INITIAL DECISION BY JAMES P. TIMONY, ADMINISTRATIVE LAW JUDGE

MARCH 28, 1977

I

PRELIMINARY STATEMENT

The Commission's complaint in this proceeding issued on May 13, 1976. It charges Perpetual Federal Savings & Loan Association (hereafter "Perpetual") with having six directors who are also directors on one of the boards of two competing banks, and that each such simultaneous board membership is an unfair act, practice, or method of competition violating Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

[2] On June 4, 1976, complaint counsel moved to amend the complaint to allege that one additional director of Perpetual was also a director of one additional competing bank. By an order filed June 29, 1976, the complaint was amended to allege that seven of the directors of Perpetual are interlocked with three competing banks.

Perpetual's answer, filed July 19, 1976, generally admits the basic allegations of the amended complaint, except that it denies that it competes with the banks or that the interlocking directorates violate the Federal Trade Commission Act. Further, the answer asserts several affirmative defenses: (1) the complaint fails to state a claim

upon which relief can be granted; (2) the interlocking directorates do not constitute an unfair method of competition or an unfair or deceptive act or practice; (3) the fact that certain of its directors are directors of banks is not a corporate act; (4) the corporate respondent is improperly charged on the basis of the allegations with respect to which only relief against individuals is provided by Section 8 of the Clayton Act, 15 U.S.C. 19; (5) the Commission lacks jurisdiction because the banks and respondent are not competitors; (6) the Federal Home Loan Bank Board has plenary and exclusive authority over respondent, which is a federally chartered and insured savings and loan association; (7) the Comptroller of the Currency, the Federal Deposit Insurance Corporation and the Federal Reserve System have primary jurisdiction over the banks; and (8) banks are specifically excluded from the provisions of Section 5 of the Federal Trade Commission Act.

A prehearing conference was held on June 28, 1976, and a briefing schedule was established for disposing of the proceeding by summary decision. On August 16, 1976, a stipulation of facts was filed. On September 24, 1976, complaint counsel filed a motion for summary decision and proposed findings. On October 28, 1976, an informal prehearing conference was held, and, respondent having retained new trial counsel, a new briefing schedule was adopted. On December 13, 1976, respondent answered complaint counsel's motion and cross-motion for summary decision. An additional stipulation of facts was filed on December 14, 1976, and on December 15, 1976, pursuant to a joint motion, respondent's amended and supplemental answer was filed. The stipulation states that on April 20, 1976, one of respondent's directors became a director emeritus of a bank in accordance with the policy of the bank that directors retire at age 72 but are eligible to be elected directors emeriti annually until the age of 80. [3] The stipulation further states that two directors had resigned from respondent's board and that two of the directors had resigned from the boards of the banks. On January 31, 1977, the National Savings and Loan League filed an *amicus* brief and supporting affidavit. On February 28, 1977, responses to the *amicus* brief were filed by counsel.

By order dated December 1, 1976, an invitation was offered to the Federal Home Loan Bank Board to file an *amicus* brief addressed to the jurisdictional issues raised by the pleadings in this proceeding. By a response dated January 25, 1977, the Board admitted that it "has a substantial and direct interest in the jurisdictional issues" in this proceeding, but has decided not to file an *amicus* brief "at this early stage of the FTC proceedings" and "reserves the right to seek

leave to file an *amicus* brief when the case comes before the full Commission."

On the basis of the stipulation of facts, affidavits and exhibits submitted with the cross-motions for summary decision, and the pleadings, I make the following findings of fact:[1]

II

FINDINGS OF FACT

[4] 1. Respondent Perpetual Federal Savings & Loan Association is a corporation organized and existing under and by virtue of the laws of the United States of America. Perpetual is a "corporation" as that term is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, and as that term is used in other sections of that Act. Perpetual is not a "bank" as that term is used in Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and is not a "bank," "banking association" or "trust company" as those terms are used in Sections 8 and 11 of the Clayton Act, 15 U.S.C. 19, 21, and is not a "savings bank" as that term is used in Section 8 of the Clayton Act. It maintains its principal place of business at 500 11th St., N.W., Washington, D.C. Perpetual has capital, surplus and undivided profits aggregating more than $71 million. (Ans., ¶ 2; Stip., ¶¶ 7 & 8.)

2. American Security and Trust Company ("American Security") is a corporation organized and existing under and by virtue of the laws of the United States of America. American Security is a "bank" as that term is used in Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. It maintains its principal place of business at 15th and Pennsylvania Ave., N.W., Washington, D.C. American Security has capital, surplus and undivided profits aggregating more than $89 million. (Ans., ¶ 3; Stip., ¶ 9.)

3. National Bank of Washington ("National Bank") is a corporation organized and existing under and by virtue of the laws of the United States of America. National Bank is a "bank" as that term is used in Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. It maintains its principal place of business at 619 14th St., N.W.,

[1] The following abbreviations are used throughout this initial decision:
"Stip." - Stipulation of August 16, 1976, with paragraph references.
"Stip. II" - Stipulation of December 13, 1976, with paragraph references.
"Ans." - Perpetual's Amended and Supplemental Answer to the Complaint, with paragraph references.
Complaint Counsel's "Reply Memo" - Complaint Counsel's Memorandum in Reply to Respondent's Answer and in Answer to Respondent's Cross-Motion for Summary Decision, Appendices A-D.
Respondent's "Cross-Motion" - Cross-Motion of Respondent Perpetual Federal Savings & Loan Association for Summary Decision Dismissing Complaint and Memorandum in Support Thereof, Together with Answer of Respondent to Complaint Counsel's Motion for Summary Decision.

Washington, D.C. National Bank has capital, surplus and undivided profits aggregating more than $42 million. (Ans., ¶ 4; Stip., ¶ 9.)

4. Union First National Bank of Washington ("Union First") is a corporation organized and existing under and by virtue of the laws of the United States of America. Union First is a "bank" as that term is used in Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. It maintains its principal place of business at 740 15th St., N.W., Washington, D.C. Union First has capital, [5] surplus and undivided profits aggregating more than $37 million. Union First was formed in December 1975 by the merger of Union Trust Company of the District of Columbia ("Union Trust") and First National Bank of Washington ("First National"). (Ans. ¶ 5; Stip., ¶ 9.)

5. Joseph B. Danzansky is and has been a member of the board of directors of National Bank since 1972. He was a director of Perpetual from 1972 until on or about September 16, 1976. (Ans. ¶ 5; Stip., ¶ 20.)

6. Lloyd H. Elliott is and has been a member of the board of directors of American Security, since 1968. He was a director of Perpetual from 1972 until on or about September 16, 1974. (Ans., ¶ 7; Stip., ¶ 20.)

7. George M. Elsey is a member of the boards of directors of both Perpetual and American Security. He has been a director of Perpetual since 1973 and of American Security since 1971. (Ans., ¶ 8.)

8. William S. Harps is a member of the boards of directors of both Perpetual and National Bank. He has been a director of Perpetual since 1970 and of National Bank since 1971. (Ans. ¶ 9.)

9 Thomas J. Owen is president of Perpetual and the son of Thornton W. Owen. He also is and has been a member of the board of directors of Perpetual since 1972. He was a director of Union First or Union Trust from 1971 until on or about September 16, 1976. (Ans., ¶ 10; Stip., ¶ 20.)

10. Thornton W. Owen is chairman of the board of directors and chief executive officer of Perpetual, and was a member of the board of directors of American Security from 1947 until April 20, 1976. He has been a director of Perpetual since 1939. Effective April 20, 1976, his status with American Security changed to that of director emeritus in accordance with the policy of that bank that directors retire from its board of directors effective at the annual meeting following their 72nd birthday. Individuals who thus retire from the board are eligible, at the option of the board, to be elected directors emeriti annually by the board until the age of 80; they are not elected by the bank corporation or by its shareholders. Mr. Thornton W. Owen's position as a director emeritus with American Security is solely honorary in nature. The bylaws and charter of American

Security do not give a director emeritus any official vote in the management of the company or provide a director emeritus with any rights, duties or responsibilities. [6] A director emeritus is not entitled to vote at meetings of the board of directors. As director emeritus of American Security, Mr. Owen may attend the meetings of the board of directors, and does attend from time to time. While he may speak at the meetings, Mr. Owen, as director emeritus, does not normally participate in discussions at the meetings, but his role is essentially that of an observer. At the board meetings, documents are available for review by each director and director emeritus. These documents include a folder containing financial reports of the company for the past month and year to date, as well as reports from committees of the bank, together with action taken by those committees in the past month. Mr. Owen may view these reports at the meeting but does not take them from the meeting. (Ans. ¶ 11; Stip. II, ¶ 19.)

11. Jean H. Sisco is and has been a member of the board of directors of Perpetual since at least May 13, 1975. She has been a director of National Bank from April 1976 until on or about September 16, 1976. (Ans., ¶ 12.)

12. "Residential loan" means a loan secured by a mortgage or other lien on non-farm property containing 1–4 dwelling units. (Stip., ¶ 1.)

13. "Savings" means a savings account or savings deposit account maintained by a financial institution. "Savings" includes all savings accounts offered by Perpetual and all savings deposit accounts offered by American Security, National Bank, and Union First. (Stip., ¶ 1.)

14. The business of Perpetual includes solicitation and maintenance of savings and the solicitation and financing of residential loans. As of December 31, 1975, it had savings of more than $682 million (or more than 97 percent of its total liabilities) and residential loans of more than $565 million (or more than 73 percent of its total assets). Perpetual conducts its business at numerous locations, including 5 offices in Washington, D.C., and 4 offices in the suburbs of Washington, D.C., in the State of Maryland. Perpetual has applied to the Federal Home Loan Bank Board for, and has received, permission to open a tenth office at 19th and K Sts., N.W., Washington, D.C. Perpetual is the largest savings and loan association in the metropolitan Washington, D.C., area. (Ans., ¶ 13; Stip., ¶¶ 12–14.)

[7] 15. The business of American Security includes the solicitation and maintenance of savings, and the solicitation and financing of

residential loans. As of December 31, 1975, American Security had savings of more than $189 million (or more than 18 percent of its total liabilities) and residential loans of more than $79 million (or more than 7 percent of its total assets). American Security is the second largest bank in Washington, D.C., and has 30 offices in the city. (Stip., ¶¶ 12, 13 & 16.)

16. The business of National Bank includes the solicitation and maintenance of savings and the solicitation and financing of residential loans. As of December 31, 1975, National Bank had savings of more than $101 million (or more than 19 percent of its total liabilities) and residential loans of more than $42 million (or more than 7 percent of its total assets). National Bank is the third largest bank in Washington, D.C., and has 25 offices in the city. (Stip., ¶¶ 12, 13 & 15.)

17. The business of Union First includes the solicitation and maintenance of savings and the solicitation and financing of residential loans. As of December 31, 1975, Union First had savings of more than $88 million (or more than 19 percent of its total liabilities) and residential loans of more than $68 million (or more than 14 percent of its total assets). Union First was formed in December 1975, by the merger of Union Trust and First National. Union First is the fourth largest bank in Washington, D.C., and has 19 offices in the city. (Stip., ¶¶ 12, 13 & 17.)

18. Perpetual solicits and maintains savings in the form of savings accounts. (Stip., ¶ 12(a)(i).) American Security, National Bank and Union First solicit and maintain savings in the form of savings deposits. (Stip., ¶ 12(a)(ii).) Perpetual, American Security, National Bank, and Union First attract savings through advertising, the convenience of office locations, hours of operation, and the rates of return paid on savings. (Stip., ¶ 12(a)(iv).) Savings accounts maintained by Perpetual and savings deposit accounts maintained by American Security, National Bank and Union First totalled the following amounts on December 31, 1975 (Stip., ¶ 12(a)(iii)):

Perpetual $682,314,000
American Security 189,685,000
National Bank 101,508,000
Union First 88,444,000

[8] 19. Perpetual, American Security, National Bank and Union First solicit and make residential loans. Each institution maintains a loan department which arranges residential loans and negotiates the terms of these loans, including, but not limited to, interest rate, maturity, and percentage of property value financed. Perpetual,

American Security, National Bank and Union First arrange loans with substantially the same terms. (Stip., ¶ 12(b).)

20. The average dollar amount of the residential loans made by Perpetual and the three banks is approximately the same. For example, during various recent periods in zip code 20007, Perpetual made 91 loans for an average of $54,468.13; American Security made 25 loans for an average of $48,400; National Bank made 12 loans for an average of $67,000; and Union First made 13 loans for an average of $70,384.62. In metropolitan Washington, during the same period of time, Perpetual's average residential loan for 274 loans was for $42,072.59, American Security's for 225 loans was for $46,715.55, National Bank's for 112 loans was for $64,205.36, and Union First's for 129 loans was for $64,844.96. (Complaint Counsel's Reply Memo, App. C.)

21. In addition to residential loans and savings, Perpetual, American Security, National Bank, and Union First offer any one or more of the following financial services or products which assist them in their competition for savings and residential loans, including:

(a) Mortgage refinancing;
(b) Christmas savings plan;
(c) Retirement Plan for the self-employed (Keogh);
(d) Individual retirement plan (IRA);
(e) Federal payroll and social security allotment;
(f) Payroll savings;
(g) Passbook loans;
(h) Money orders up to $250;
(i) Save-by-mail;
(j) Note collections;
(k) Travelers checks;
(l) Telephone transfer;
(m) Home improvement loan;
(n) Safe deposit boxes;
(o) U.S. savings bonds issued and redeemed;
(p) Acceptance of payments of utility bills;
(q) Drive-up window;
(r) After hours depository; and
(s) Check cashing service (Stip., ¶ 12(c–d)).

[9] 22. Perpetual does not provide, but is authorized to provide at its option, the following financial services provided by American Security, National Bank and Union First:

(a) Savings deposits;
(b) Time Savings; and
(c) Certificates of deposit larger than $100,000. (Stip., ¶¶ 6(b), 12(d).)

23. In an application for a branch to be located at 19th and K Sts., N.W., dated February 2, 1976, the President of Perpetual stated:

> Recently, commercial banks in the area have been increasing their service capacity by extending their working hours, through manned walk-up teller windows and twenty-four hour banking machines. The result of these installations together with greater numbers of branch offices has given the *commercial banks a distinct marketing advantage over competing thrift institutions* in the area. (Stip. App. at p. 36.) (Emphasis added.)

24. The boards of directors of Perpetual, American Security, National Bank, and Union First are elected, hold meetings, and perform their functions in the District of Columbia. (Ans., ¶ 18; Stip., ¶ 10.)

25. Perpetual, American Security, National Bank, and Union First conduct their business, as hereinabove described, in the District of Columbia and in various States of the United States. (Ans., ¶ 18; Stip., ¶¶ 9, 10, 12.)

26. Perpetual, American Security, National Bank, and Union First engage in "commerce" and conduct their business, including activities involving their boards of directors, in or affecting "commerce," as the term "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44. (Ans., ¶ 18; Stip., ¶¶ 9, 10, 12.)

27. Perpetual, American Security, National Bank, and Union First are governed by their respective boards of directors. Each board has the ultimate decision on matters affecting its institution. Such matters include, but are not limited to, selection of officers to manage and operate the institution, establishment of earnings or interest rates payable on savings and interest rates and other terms for residential loans, and selection of and application for additional branch facilities. (Stip., ¶ 18.) [10]

III

DISCUSSION

MERITS

There is no genuine issue as to the truth of these material facts: (1)

Seven of the eleven members of the board of directors of Perpetual simultaneously served on one of the boards of three banks;[2] and (2) Perpetual, the largest savings and loan association in Washington, D.C., and the three banks (the second, third and fourth largest in the city) engage in the same business of attracting savings and making residential loans, amounting to approximately one and three-quarters billion dollars.[3] These facts, without more, constitute a violation of Section 5(a)(1) of the Federal Trade Commission Act.[4] Congress gave the Commission power under Section 5: "to hit at every trade practice, then existing or thereafter contrived, which restrained competition or might lead to such restraint if not stopped in its incipient stages." *FTC* v. *Cement Institute,* 333 U.S. 683, 693 (1948). Interlocking directors among these competing firms inherently create risks of anticompetitive effects; this unfair practice must cease in the public interest.

Savings and loan association ("S&L")/bank interlocks among competing firms are an unfair trade practice in violation of Section 5 for two reasons: (1) the practice violates the policy of Section 8 of the Clayton Act,[5] [11] and (2) it amounts to an incipient violation of the Sherman Act.[6] Such violations of the central policy of the antitrust laws clearly violate Section 5. *FTC* v. *Brown Shoe Co., Inc.,* 384 U.S. 316, 321 (1966).

Policy of Section 8

The policy of Section 8 can be seen from reading the words of the statute pertaining to competing corporations. With the exception of certain banking organizations and common carriers, it flatly prohibits interlocking directors among large competing corporations: "[N]o person at any time shall be a director in any two or more corporations . . . if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors. . . ."[7] There is no need to assess the nature of the

[2] Findings 5–11.

[3] Findings 14–23.

[4] "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful." 15 U.S.C. 45(a)(1).

[5] "No person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, . . . if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. . . ." 15 U.S.C. 19.

[6] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . ." 15 U.S.C. 1.

[7] The provision in Section 8 dealing with banks provides:

"No private banker or director, officer or employee of any member bank of the Federal Reserve System or any branch thereof shall be at the same time a director, officer or employee of any other bank, banking

(Continued)

industry or to look at mitigating circumstances.[8] It is a *per se* statute. Congress had reasons for being so strict.

[12] The Clayton Act's provisions regulating interlocking directorates grew out of the reports of two Congressional investigations of interlocking directorates. See *Investigation of United States Steel Corp.*, H.R. Rep. No. 1127, 62d Cong., 2d Sess. (1912) (Report of the Stanley Committee); *Investigation of Concentration of Control of Money and Credit*, H.R. Rep. No. 1593, 62d Cong., 3d Sess. (1913) (Report of Pujo Committee). In the Pujo Committee Report, the policy for prohibiting common directors between competing financial institutions was explained, *Id.* at p. 140:

> As the first and foremost step in applying a remedy and also for reasons that seem to us conclusive, independently of that consideration, *we recommend that interlocking directorates in potentially competing financial institutions be abolished and prohibited so far as lies in the power of Congress to bring about that result.* . . . When we find, as in a number of instances, the same man or director in half a dozen or more banks and trust companies all located in the same section of the same city, doing the same class of business and with a like set of associates similarly situated, all belonging to the same group and representing the same class of interests, all further pretense of competition is useless. . . . If banks serving the same field are to be permitted to have common directors, genuine competition will be rendered impossible. Besides, this practice gives to such common directors the unfair advantage of knowing the affairs of borrowers in various banks, and thus affords endless opportunities for oppression. (Emphasis added.)

And both the Senate Report and House Report on Section 8 show the spirit of the statute applicable here. Simultaneously discussing the significance of both the banking and competing corporation interlock proscriptions contained in the statute, the reports state:

> The importance of the legislation embodied in Section [8] of this bill can not be overestimated. The concentration of wealth, money, and property in the United States under the control and in the hands of a few individuals or great corporations has grown to such an enormous extent that unless checked it will ultimately threaten the perpetuity of our institutions. *The idea that there are only a few men in any of our great corporations and industries who are capable of handling the affairs of the same is contrary to the spirit of our institutions.* From an economic point [13] of view, it is not possible that one individual, however capable, acting as a director in fifty corporations, can render as effective and valuable service in directing the affairs of the several corporations under his control as can fifty capable men acting as single directors and devoting their entire time to directing the affairs of one of such corporations. The truth is that the only real service the same director in a great number of corporations renders is in maintaining uniform policies throughout the

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association, savings bank, or trust company. . . ."

Congress was even more concerned about interlocks between these financial institutions and proscribed interlocking officers and employees as well as directors between such institutions.

[8] "[Section 8] establishes rather simple objective criteria for judging the legality of an interlock. . . . [A] marketwide analysis of competition is unnecessary . . . ." *Protectoseal Co.* v. *Barancik*, 484 F.2d 585, 589 (7th Cir. 1973) (Stevens, J.).

entire system for which he acts, which usually results to the advantage of the greater corporations and to the disadvantage of the smaller corporations which he dominates by reason of his prestige as a director and to the detriment of the public generally. [S. Rep. No. 698, 63d Cong., 2d Sess. 16 (1914); H.R. Rep. No. 627, 63d Cong., 2d Sess. 19–20 (1914).] (Emphasis added.)

The purposes of Congress in passing Section 8 are unmistakably clear. In a leading case under the statute, *United States* v. *Sears, Roebuck & Co.*, 111 F. Supp. 614 (S.D.N.Y. 1953), Judge Weinfeld said, at p. 616, that:

Section 8 was but one of a series of measures which finally emerged as the Clayton Act, all intended to strengthen the Sherman Act, which, through the years, had not proved entirely effective. Congress had been aroused by the concentration of control by a few individuals or groups over many gigantic corporations which in the normal course of events should have been in active and unrestrained competition. Instead, and because of such control, the healthy competition of the free enterprise system had been stifled or eliminated. *Interlocking directorships on rival corporations had been the instrumentality of defeating the purpose of the antitrust laws. They tended to suppress competition or to foster joint action against third party competitors.* The continued potential threat to the competitive system resulting from these conflicting directorships was the evil aimed at. Viewed against this background, a fair reading of the legislative debates leaves little room for doubt that, in its efforts to strengthen the antitrust laws, *what Congress intended by § 8 was to nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through* [14] *interlocking directorates. The legislation was essentially preventative.* (Emphasis added.)*

The fears of Congress as to the undesirable effects of interlocking directors have been established by empirical evidence. After analyzing the effects of interlocking directors among the 1,000 largest manufacturing corporations and some 330 non-manufacturing corporations, the Federal Trade Commission in 1950 found that:

An individual who is a member of more than one board of directors cannot divide his personality into unrelated segments. When sitting on one board he necessarily continues to know what he has found out on other boards, what he has recommended to those boards, and what action those boards have taken. He would be derelict to his responsibility if in two different boards of directors he supported policies each of which would tend to defeat the course of action he had recommended or seen adopted in the other company. Hence, wherever an individual serves on the boards of two or more companies that have interests related to each other, his duty as a director is necessarily to harmonize those interests so far as possible. If he cannot do so he can fulfill his duty to both companies only by withdrawing from further participation in

* Respondent acknowledges that Congress responded, in part, to the writings of Brandeis by enacting Section 8 of the Clayton Act. Cross-motion memo, p. 140. Brandeis summarized Section 8 as follows:

"The practice of interlocking directorates is the root of many evils. Applied to rival corporations, it tends to the suppression of competition and to violation of the Sherman law. Applied to corporations which deal with each other, it tends to disloyalty and to violation of the fundamental law that no man can serve two masters. In either event it tends to inefficiency, for it removes incentives and destroys soundness of judgment." [*Other People's Money*, Brandeis, 51 (1932).]

the business at hand. A director of two competing corporations cannot in good conscience recommend that either shall undertake a type of competition which is likely to injure the other. . . . Thus the inherent tendency of interlocking directorates between [15] companies . . . that have relations to each other as competitors, is to blunt the edge of rivalry between corporations, to seek out ways of compromising opposing interests, and to develop alliances where the interest of one of the corporations is jeopardized by third parties.

Insofar as the idea of meticulous stewardship by boards of directors has been relaxed in practice, the effect of relaxation has necessarily been to strengthen these tendencies. Governmental investigations and private law suits have revealed impressive cases in which directors have regarded themselves as spokesmen of special interests other than those of the owners of the corporation on whose board they sit. When a director of one corporation views himself as a representative of another corporation and seeks to serve the interest of the latter even at the expense of the interest of the former, his directorship has an obvious tendency to destroy the independence of the former concern . . . [*Report of the Federal Trade Commission on Interlocking Directorates*, H.R. Doc. No. 652, 81st Cong., 2d Sess. pp. 20–21 (1951).]

Relating his experience from a "special review," Chairman of the Board of Governers, Federal Reserve Board, Arthur F. Burns recently advocated banning interlocking directors among competing financial institutions, including banks and savings and loan associations, engaged in the business of receiving deposits:

Interlocking directorates are not necessarily harmful. They can benefit the corporations involved and the public they serve by facilitating the free interchange of advice, ideas, and experiences among directors of the varied backgrounds that are necessary to maintain high standards of performance by boards of directors.

However, interlocking relationships between institutions that compete for the funds of the public involve a risk of abuse that the Board believes outweighs the reasonable expectation of benefits that might flow from such relationships.[10]

[16] As evidenced by the statute, its legislative history, and experience, it is clear that S&L/bank interlocks among competing firms violate the policy of Section 8 of the Clayton Act. The "broad power of the Commission is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws." *FTC* v. *Brown Shoe, Inc.*, 384 U.S. 316, 321 (1966).[11]

Incipient Violation of the Sherman Act

The director interlock between competitors may lead to trade restraints in violation of Section 1 of the Sherman Act. The relationship creates a means by which *per se* illegal agreements

[10] Letter to Senator Proxmire, dated Sept. 28, 1976, respondent's Cross-motion, Exhibit H.

[11] Since there is nothing to show that Congress intentionally excluded S&L/bank interlocks from Section 8, *infra*, no Congressional policy is upset here. *Grand Union Co.* v. *FTC*, 300 F.2d 92, 98–99 (2d Cir. 1962).

between competitors may be reached involving price fixing and division of markets. Furthermore, the relationship creates an incentive for such illegal agreements because the joint director is now interested in increasing the profits of both firms and one way to do that is to eliminate competition between them. Even if competition is not reduced by formal agreement, such an interlock will surely increase the exchange of competitive information between the interlocked competitors. The exchange of competitive information between competitors under certain circumstances has been held to be *per se* illegal under the Sherman law. *United States* v. *Container Corp. of America*, 393 U.S. 333 (1969).

The kind of information which may be exchanged through the interlocking directors, and the matters concerning which agreement may be reached by the arrangement, are indicated by the subjects decided by the boards of the competing financial institution involved here: Perpetual, American Security, National Bank and Union First are governed by their respective boards of directors. Each board has the ultimate decision on matters affecting its institution. Such matters include selection of officers to manage the institution, setting the earnings or interest rates payable on savings and interest rates and other terms for residential loans, and selection [17] of and application for additional branch facilities. (Finding 27.) The exchange of information concerning such competitive information and agreements resulting therefrom would clearly violate the Sherman Act. The fact that this may not yet have happened is immaterial. *United States* v. *Sears, Roebuck & Co.*, 111 F. Supp. 614, 620 (S.D.N.Y. 1953):

> While the government does not charge that any such agreement has here been made or is contemplated, a director serving in a dual capacity might, if he felt the interests of an interlocking corporation so required, either initiate or support a course of action resulting in price fixing or division of territories or a combination of his competing corporations as against a third competitive corporation. The fact that this has not happened up to the present does not mean that it may not happen hereafter.

The interlocks here build an unlawful bridge, regardless of whether illegal trafficking has yet occurred.

The Federal Trade Commission was designed to stop conduct which conflicts with the policy of the Sherman Act even though that conduct does not violate the Sherman Act. *FTC* v. *Cement Institute*, 333 U.S. 683, 691-92, 694 (1948). It was one of the hopes of those who sponsored the Federal Trade Commission Act that its effect might be prophylactic and through it violations of the Sherman Act might be stopped in their incipiency. *Fashion Originators' Guild* v. *FTC*, 312 U.S. 457, 466 (1941). The S&L/bank director interlocks here, among

financial firms competing for deposits and in making residential loans, are unfair because they so easily may lead to the exchange of competitive information and agreements to harmonize competitive discord, which, once they occur, would amount to trade restraints violating the Sherman Act.

Violations of Public Values

The Federal Trade Commission has the power to hold a practice unfair and a violation of Section 5 by looking at public values not included in the antitrust laws. Just that question was before the Court in *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233 (1971).[12] The Court remanded the case to the Commission because there was no indication in the Commission's opinion that S&H's conduct was unfair in its effect on competitors "because of considerations other than those at the root of the antitrust laws," nor was there any discussion of damage to consumers. *Id.* at 247. The Court articulated [18] a refined test for determining when such effects will be "unfair" and a violation of Section 5, *Id.* at 244:

> . . . [T]he Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.

The Court pointed out that the Commission has described the following factors to be considered in this determination, *Id.* at pp. 244–45, n.5:

> "(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).". . . "The wide variety of decisions interpreting the elusive concept of unfairness *at least* makes clear that a method of selling violates Section 5 if it is exploitive or inequitable and if, in addition to being morally objectionable, it is seriously detrimental to consumers." (Emphasis is by the Court.)

The Court made it clear that this "public values" test could be used to proscribe both unfair competitive practices, and practices unfair in their effect upon consumers, *Id.* at 239:

> . . .[D]oes § 5 empower the Commission to define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or

[12] The lower court had found S&H's conduct did not violate the letter or spirit of the antitrust laws, and the Commission did not appeal that question. *Id.* at 239.

the spirit of the antitrust laws? Second, does § 5 empower the Commission to proscribe practices as unfair or deceptive in their effect upon consumers regardless of their nature or quality as competitive practices or their effect on competition? We think the statute, its legislative history, and prior cases compel an affirmative answer to both questions.

[19] Complaint counsel argue that Perpetual's interlocking directors violate the public values test of *S&H,* citing comments of Justice Brandeis,[13] President Wilson,[14] and the Pujo Committee,[15] pointing out the potential conflicts of interest and elimination of competition which can occur through the practice.

In my opinion, the public values test of *S&H* is applicable only when a practice may be unfair even though it is not within the letter or spirit of the antitrust laws. If the practice violates the policy codified by the antitrust laws, the established concept of those laws, as defined by the statutory history and language and the cases interpreting the concept, should be the test of the practice rather than the more ethereal public values argument proposed by complaint counsel. The legislature, the courts, and the regulatory agencies have studied interlocking directors for more than sixty years. No moral suppositions are necessary. The public will has already been announced and defined in the statutes and cases.

There Are No Genuine Issues of Material Facts

Respondent contends that complaint counsel's motion for summary decision cannot be decided because there remain genuine issues of material fact, such as: (1) whether there is competition between Perpetual and the banks; (2) whether that competition is substantial; and (3) whether there has been any injury to competition resulting from the challenged director interlocks.

[20] The stipulation and documents introduced by complaint counsel show that Perpetual competes with each of the three banks in attracting savings and making residential loans. (Findings 18–23.) The evidence shifts to respondent Perpetual the burden of coming forward with facts to dispute the inferences raised by such evidence. *First National Bank* v. *Cities Service Co.,* 391 U.S. 253, 289–90 (1968). While Perpetual asserts that it does not compete with the banks, it has not adduced "any significant probative evidence" tending to support that assertion. *Id.* at p. 290. Of course, on summary decision the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *United*

[13] L. Brandeis, *Other People's Money,* p. 51 (1932).
[14] *Id.* at 223.
[15] H. R. Rep. No. 1593, 62d Cong., 3d Sess, 140 (1913).

States v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962). But if those facts support only one conclusion, there is no need for a trial.

In response to facts showing competition between Perpetual and the banks in soliciting savings and making residential loans, respondent relies on the argument that banks are primarily interested in making commercial loans involving higher rates of interest, shorter terms, and larger amounts. In an affidavit of its chief executive officer, respondent asserts that the average amount of "mortgage loans" made by American Security and National Bank was approximately six times as large as the average loan made by respondent. When the amount is determined for the average *residential* mortgage loan by banks, however (as different from the average amount for *commercial* mortgage loans), the average loan by both respondent and the banks is about the same. (Finding 20.)

Respondent contends that whatever competition exists between the banks and savings and loans is not substantial. One proof offered in this regard is that commercial banks use only part of their resources to make residential loans. "The fact that this volume . . . may represent but a small percentage . . . does not militate against the undesirability of directorates common to both corporations." *United States* v. *Sears, Roebuck & Co.*, 111 F. Supp. 614, 620 (S.D.N.Y. 1953).

Further, the amounts here involved show the public interest. Respondent's savings deposits at the end of 1975 amounted to more than $680 million; the three banks' savings deposits totalled $378 million. Perpetual's residential loans [21] exceeded $565 million; the three banks' residential loans totalled $189 million. (Findings 14–17.) These amounts are not insubstantial.[16]

Respondent also argues that, as a matter of law, savings and loan associations do not compete with banks, relying on merger cases which hold that the relevant product market in which to test the impact of the merger of two banks should not include savings and loan associations. *United States* v. *Connecticut National Bank*, 418 U.S. 656 (1974); *United States* v. *Phillipsburg National Bank & Trust Co.*, 399 U.S. 350 (1970). It is clear, however, that those cases limit the relevant market to the "cluster of services" offered by banks only as a matter of the facts developed on those records. *United States* v. *Connnecticut National Bank*, 418 U.S. 656 at 663–64, n.3. When the challenged acquisition involved a bank and a savings and loan association, the relevant market was drawn to include the competi-

[16] The requirement in Section 8 of the Clayton Act that one of the two interlocked corporations have capital, surplus and undivided profits totalling more than $1,000,000 is a protection against *de minimis* cases rather than a requirement for showing effect on competition. *United States* v. *Sears, Roebuck & Co.*, 111 F.Supp. 614, 621 (S.D.N.Y. 1953).

tion by both financial institutions. *Fort Worth National Corp.* v. *Federal Savings & Loan Insurance Corp.*, 469 F.2d 47 (5th Cir. 1972).

While there is no direct evidence in this record of adverse effect on competition or consumers from the interlocked directorates—no agreement to fix rates of return on savings or interest on residential loans, no cooperation in reducing services supplied by the competing financial institutions—direct evidence of detrimental impact on competition is not required for the Commission to find a practice unfair.[17] Such proof was required in early cases involving the Commission's resort to Section 5 to challenge practices covered by the Clayton Act but technically outside the statute.[18] But those [22] cases have been rejected by the Supreme Court. *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 239–40 (1971). The law is now best summarized in *FTC* v. *Brown Shoe Co., Inc.*, 384 U.S. 316, 320–22 (1966):

> [T]he Commission has broad powers to declare trade practices unfair. This broad power of the Commission is particularly well established with regard to trade practices which conflict with the basic practices of the Sherman and Clayton Acts even though such practices may not actually violate these laws. The record in this case shows beyond doubt that Brown, the country's second largest manufacturer of shoes, has a program, which requires shoe retailers, unless faithless to their contractual obligations with Brown, substantially to limit their trade with Brown's competitors. This program obviously conflicts with the central policy of both § 1 of the Sherman Act and § 3 of the Clayton Act against contracts which take away the freedom of purchasers to buy in an open market. Brown nevertheless contends that the commission had no power to declare the franchise program unfair without proof that its effect 'may be substantially to lessen competition or tend to create a monopoly' which of course would have to be proved if the Government were proceeding against Brown under § 3 of the Clayton Act rather than § 5 of the Federal Trade Commission Act. We reject the argument that proof of this § 3 element, must be made for . . . our cases hold that the Commission has power under § 5 to arrest trade restraints in their incipiency without proof that they amount to an outright violation of § 3 of the Clayton Act or other provisions of the antitrust laws.

The interlocks in this proceeding violate the policy of Section 8 of the Clayton Act and constitute incipient violations of Section 1 of the Sherman Act. The kind of agreements and transfers of information between competitors which could result from the interlocking directors may eliminate competition through price fixing or territorial allocation, constituting *per se* violations of Section 1 of the Sherman Act, without regard to the amount of commerce affected. *United States* v. *Sears, Roebuck & Co.*, 111 F. Supp. 614, 621 (S.D.N.Y.

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[17] Where a violation of Section 8 of the Clayton Act is alleged, no such proof would be required. *Protectoseal Co.* v. *Barancik*, 484 F.2d 585, 589 (7th Cir. 1973).

[18] Howrey, *Utilization by the FTC of Section 5 of the FTC Act as an Antitrust Law*, 5 Antitrust Bull., 161, 166 (1960).

1953). Proof of injury to competition or consumers is therefore unnecessary to holding that the interlocks here violate Section 5 of the Federal Trade Commission Act, and this matter may be concluded upon summary decision without a trial. [23]

JURISDICTION

The Federal Trade Commission has jurisdiction to prevent Perpetual from engaging in director interlocks with the three competing banks. That jurisdiction springs from Section 5 of the Federal Trade Commission Act, and Congress did not intend an exemption to Section 5 by granting the Federal Home Loan Bank Board ("FHLBB" or "Board") jurisdiction over Perpetual. The Commission and the FHLBB share concurrent jurisdiction over Perpetual and its interlocks.[19] The FHLBB has neither exclusive nor primary jurisdiction in this matter.[20]

The Statutes

Section 5(a)(2) of the Federal Trade Commission Act, as amended, 15 U.S.C. 45(a)(6) provides: "The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." Perpetual admits that it is such a corporation. (Ans., ¶ 2.) Perpetual argues, however, that Congress has given exclusive jurisdiction to the FHLBB over the interlocking directorates between banks and S&Ls.

[24] The FHLBB was created in 1933 when Congress passed the Home Owners Loan Act (HOLA), 12 U.S.C. 1461, *et seq.*, which gave the Board authority to charter and supervise federal S&Ls.[21] Pursuant to the statute, the Board is empowered to prescribe rules and regulations providing for the "organization, incorporation, examination, operation and regulation" of federal savings and loan

[19] The FHLBB has acknowledged that the FTC has jurisdiction over some practices of S&Ls. In a policy statement, the FHLBB stated that it would discourage S&Ls from participating in lease arrangements which it believed could violate Section 5 of the FTC Act. 41 F.R. 2806 (1976).

[20] While the issues of primary or exclusive jurisdiction usually involve a federal court and an administrative agency, the doctrines have been applied where two agencies are involved. *American Airlines, Inc.* v. *Airline Pilots Ass'n*, 91 F.Supp. 629 (E.D.N.Y. 1950); *In re Food Fair Stores, Inc.*, 54 F.T.C. 392 (1957).

[21] The Board derives authority from acts other than HOLA. For example, the Federal Home Loan Bank Act, 12 U.S.C. 1421–49, established Federal Home Loan Banks and gave the FHLBB authority to issue rules and regulations governing the operations of such banks. The Federal Home Loan Mortgage Corporation Act, 12 U.S.C. 1451–59, created the Federal Home Loan Mortgage Corporation, under the direction of the FHLBB, to supplement the Federal National Mortgage Association. See 1970 U.S. Code Cong. & Ad. News, pp. 3488, 3495. The National Housing Act, as amended, 12 U.S.C. 1701, *et seq.*, created the Federal Savings and Loan Insurance Corporation ("FSLIC") under the FHLBB, providing for insurance of savings and loan accounts, and giving the Board, through FSLIC, authority to regulate savings and loan holding companies. See 12 C.F.R. 561, *et seq.*

associations, 12 U.S.C. 1464(a). The Board regulates S&Ls' entry into the market, 12 U.S.C. 1432 and 1464(a), and their mergers, 12 U.S.C. 1464(d)(11). And under 12 U.S.C. 1464(d), the Board is empowered to bring proceedings to enforce compliance with law, and conditions it may impose.[22] The substantive law violations which the Board can regulate include (A) violations of "a law, rule, regulation, or charter or other condition imposed in writing by the Board;" (B) engaging in an "unsafe or unsound practice;"[23] (C) violations or practices which constitute a breach of fiduciary duty by a director or an officer in which the Board determines "that the association has suffered or will probably suffer substantial financial loss or other damage or that the interests of its savings account holders could be seriously prejudiced." The grounds [25] for appointment of a conservator or receiver for an association under the statute include: (1) insolvency, (2) dissipation of assets or earnings, (3) an unsafe or unsound condition to transact business, (4) willful violation of a cease and desist order, (5) concealment of books, papers, records or assets from inspection by a Board examiner.

The substantive violations aimed at by § 1464(d) indicate that Congress intended by the statute to promote the growth of a safe and sound thrift industry.[24] The purpose for the Board's authorization to regulate federal savings and loan associations is: "to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes . . ." 12 U.S.C. 1464(a). The Board's primary regulatory authority, then, is to prevent savings and loan associations from engaging in unsafe and unsound financial practices.[25] Thus, the Board's regulatory authority and the Commission's enforcement powers are complementary in controlling the financial practices and anticompetitive conduct of S&Ls.

When the FHLBB was created in 1933, Congress did not amend the Federal Trade Commission Act to exempt S&Ls.[26] Congress did amend the FTC Act after passing the Civil Aeronautics Act, so that air carriers would be exempt from Section 5. (Act of June 23, 1938,

[22] The means of compliance provided therein include cease and desist proceedings, temporary cease and desist orders, court suits for injunctions, suspension or removal of directors or officers, and appointment of conservators or receivers.

[23] This phrase connotes risk of financial loss to the S&L, its shareholders, or the agencies insuring the S&L. See statement of Chairman of FHLBB, 112 Cong. Rec. 25008 (1966).

[24] *Cf., Hearings on H.R. 4980 Before the House Comm. on Banking and Currency,* 73d Cong., 1st Sess. 12 (April 21, 1933); H.R. Rep. No. 1922, 73d Cong., 2d Sess. 4 (1934); 78 Cong. Rec. 11192 (1934).

[25] The National Housing Act also shows Congress' intent that the Board prevent unsafe financial practices, *e.g.,* 12 U.S.C. 1726(b) and (c).

[26] While federal savings and loan associations were not created until 1933, the first S&L in this country was established in 1831, and these thrift institutions were in existence when the Federal Trade Commission Act was passed. *Amicus* Brief of the National Savings and Loan League, p. 5. Thus, Congress could have excluded S&Ls from Commission jurisdiction under Section 5 just as banks were exempted, if that had been the legislative intent.

Pub. Law No. 706, 52 Stat. 1028.) Similarly, the Clayton Act was amended after creation of the Civil Aeronautics Board and the Federal Communications Commission (Act of June 19, 1934, Pub. Law No. 416, 48 Stat. 1102), so that those two agencies, and not the Commission, would enforce the Act against the industries they regulate.

[26] Nothing in the statutes creating or supporting the FHLBB indicates any legislative intent to grant S&L/bank interlocks an implied exemption from Section 5 of the Federal Trade Commission Act.[27] There is nothing in the statutes which would even require the FHLBB to consider the antitrust laws in its regulatory decisions. See *Otter Tail Co.* v. *United States,* 410 U.S. 366, 373 (1973); *California* v. *Federal Power Commission,* 369 U.S. 582, 589 (1962).

The statutes show that the Federal Trade Commission and the Federal Home Loan Bank Board have concurrent jurisdiction over the activities of savings and loan associations, including S&L/banking director interlocks. [27]

Legislative History re Interlocks

The legislative history of the debates on the Federal Trade Commission and Clayton Acts shows that Congress intended that the Commission should have jurisdiction to challenge anticompetitive interlocking directorates as unfair methods of competition.[28]

Since the subject of interlocking directorates was specifically addressed in Section 8 of the Clayton Act, respondent argues that Congress must have intended an exemption for such practices from the broader prohibition against "unfair" practices in the Federal Trade Commission Act. During the debates on the Clayton Act, statements of the legislators made it clear that the Act was directed at particularly offensive practices which had already been found to restrain competition. The legislators wanted to prohibit these practices by proscribing them with specific statutory language. They

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[27] Section 5(d)(1) of HOLA, 12 U.S.C. 1464(d)(1), vests the Board with enforcement powers against savings and loan associations. The provision states that:

> "[t]he Board shall have power to enforce this section and rules and regulations made hereunder. In the enforcement of any provision of this section or rules or regulations made hereunder, or any other law or regulation, or in any other action, suit, or proceeding to which it is a party or which it is interested . . . the board is authorized to act in its own name and through its attorneys."

Respondent contends that the phrase "or any other law" could give the power to the Board to enforce any law, and it could, therefore, prohibit unfair methods of competition. I read the thrust of that statute as authorizing FHLBB to go to court directly, rather than through the Department of Justice. Compare Section 5(m) of the FTC Act, 15 U.S.C. 45(m) added by the Trans-Alaska Pipeline Act. In any event, it is not the specific direction to regulate which would imply an exemption to the antitrust laws. *Federal Maritime Commission* v. *Seatrain Lines, Inc.,* 411 U.S. 726 (1973).

[28] These statutes should be read *in pari materia. United States* v. *American Building Maintenance Industries,* 422 U.S. 271, 277 (1975); *FTC* v. *Brown Shoe Co.,* 384 U.S. 316, 320-22 (1966).

clearly did not intend that the Clayton Act would restrict the authority of the Commission under Section 5.[29]

The debates on the Federal Trade Commission Act also show that Congress did not intend any exemption for particular unfair practices. Congress explicitly considered, and rejected the proposed specification of "unfair methods of competition" by enumerating the particular practices to which that phrase was intended to apply. *FTC* v. *Sperry & Hutchinson Co.*, 405 233, 240 (1972).[30]

[28] Scattered statements by legislators during the debates on the Federal Trade Commission and Clayton Acts expressed their own opinion that Section 5 would not cover interlocking directorates, among other specific practices. 51 Cong. Rec. 11102-03 (1914); 51 Cong. Rec. 14216 (1914). Other legislators felt that Section 5 did cover interlocking directors. 51 Cong. Rec. 8978, 11103, 11106, 11537, 12147, 12980, 15829, 15998-99 (1914). These various opinions show the difficulty in judging legislation solely by casual statements from the debates in Congress.[31] Context is lost. Meaning is obscured. Mr. Justice Jackson admonished in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 395–96 (1951):

> Resort to legislative history is only justified when the face of the Act is inescapably ambiguous, and then I think we should not go beyond Committee reports, which presumably are well considered and carefully prepared. . . . [T]o select casual statements from floor debates, . . . as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its important functions.

Here, a committee report reflects the Congressional will. The Report of the Senate Interstate Commerce Committee, the [29] committee which inserted the essential language of Section 5, stated the meaning of the phrase "unfair competition," S. Rep. No. 597, 63d Cong., 2d Sess., 13 (1914):

> One of the most important provisions of the bill is that which declares unfair competition in commerce to be unlawful . . . .
>
> The committee gave careful consideration to the question as to whether it would

[29] 51 Cong. Rec. 12030, 14215, 14226-27, 14257-59, 15999, 16001 (1914).

[30] "It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task." H.R. Rep. No. 1142, 63d Cong., 2d Sess., 18-19 (1914). Also see Senate Report No. 597, 63d Cong., 2d Sess., 13 (1914).

[31] In 1914, a few legislators expressed doubt that interlocking directors were a "method of competition" within the meaning of Section 5. 51 Cong. Rec. 12980 (1914); 51 Cong. Rec. 14227 (1914); 51 Cong. Rec. 14216 (1914). The majority of Congress did not have this worry over semantics since price fixing and boycotts were obviously meant to be covered by the act and, like interlocks, are more precisely described as methods of not competing. *Fash. Org. Guild* v. *FTC*, 312 U.S. 457 (1941); *Safeway Stores, Inc.* v. *FTC*, 366 F.2d 795 (9th Cir. 1966), *cert. denied*, 386 U.S. 932 (1967). It is the unfair effect on competitors, as well as consumers, which was prohibited by the statute. *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 243 (1972).

attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be the better . . . .

. . .The Committee was of the opinion that it would be better to put in a general provision condemning unfair competition than to attempt to define the numerous unfair practices, such as . . . *interlocking directorates* . . . intended to restrain substantial competition. (Emphasis added.)

Respondent cites proposed amendments to Section 5 which would have specifically proscribed interlocking directorates which were rejected by the House, 51 Cong. Rec. 9050-51 (1914), and reintroduced and rejected by the Senate. *Id.* at 12991-93. These attempts, however, show concern of Congress that interlocks be controlled, not that interlocks were beyond the Commission's power. The proposed amendments were rejected because Congress wanted the Commission to have broad power. In *FTC* v. *Cement Institute,* 333 U.S. 683 (1948), the Supreme Court analyzed the legislative history of the FTC Act and concluded at p. 693:

All of the committee reports and the statements of those in charge of the Trade Commission Act reveal an abiding purpose to vest both the Commission and the courts with adequate powers to hit at every trade practice, then existing or thereafter contrived, which restrained competition or might lead to such restraint if not stopped in its incipient stages.

[30] The legislative history of the Federal Trade Commission Act and the Clayton Act thus shows that Section 5 covers interlocking directors. See in re *Kraftco Corp.,* [89 F.T.C. 46] Vol. 3, CCH Trade Reg. Rep. ¶ 21,263 (Final Order issued January 11, 1977).

No Implied Exemption

The Federal Trade Commission Act applies here unless Congress has indicated, by express statutory language or a clear statement of its intent, that respondent's conduct is exempt. There is no express exemption here.[32] Rather, the issue is whether Congress, by creating the pervasive regulation of savings and loan associations by the FHLBB, exempted by implication the operation of the Federal Trade Commission Act.[33] There is judicial disfavor for implied exemptions to the strong national policy expressed in the antitrust[34] laws: "Repeals of the antitrust laws by implication from a regulatory

[32] Compare 49 U.S.C. 5(11) (ICC); 49 U.S.C. 1384 (CAB).

[33] Respondent argues that the Federal Trade Commission Act was not intended to cover financial institutions and that it need not show, therefore, that Congress impliedly exempted them from FTC jurisdiction by creating the FHLBB. I find, however, that the Federal Trade Commission Act does cover S&Ls, *supra.*

[34] While the Federal Trade Commission Act *procedurally* may not be an antitrust law for purposes of private civil suits, *New Jersey Wood Finishing Co.* v. *Minnesota Min. & Mfg. Co.,* 332 F.2d 346, 350 (3d Cir. 1964), *aff'd,* 381 U.S. 311 (1965), it certainly is *substantively* an antitrust law, since incipient violations of the Sherman or Clayton

(Continued)

statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 350-51 (1963).

[31] The courts have held that the regulation of the federal S&Ls by the FHLBB is sufficiently pervasive to preempt inconsistent state law, *e.g., Myers* v. *Beverly Hills Federal Savings and Loan Association,* 499 F.2d 1145 (9th Cir. 1974); *Rettig* v. *Arlington Heights Federal Savings and Loan Association,* 405 F. Supp. 819 (N.D. Ill. 1975); *People* v. *Coast Federal Savings and Loan Association,* 98 F. Supp. 311 (S.D. Cal. 1951). But the "pervasiveness" of the regulatory scheme needed for exemption here would probably have to be tantamount to the regulation of public utilities. *Cf. Gordon* v. *New York Stock Exchange,* 422 U.S. 659, 688 (1975); *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 352 (1963). Furthermore, in *Philadelphia National Bank,* the Supreme Court held that the regulation by federal bank regulatory agencies—the agencies most closely related to the FHLBB—is not sufficiently pervasive to displace the antitrust laws. 374 U.S. at 352:

> [B]ank regulation is in most respects less complete than public utility regulation, to which interstate rail and air carriers, among others, are subject. Rate regulation in the baking industry is limited and largely indirect, . . . banks are under no duty not to discriminate in their services; and though the location of bank offices is regulated, banks may do business—place loans and solicit deposits—where they please. The fact that the banking agencies maintain a close surveillance of the industry with a view toward preventing unsound practices that might impair liquidity or lead to insolvency does not make federal banking regulation all-pervasive, although it does minimize the hazards of intense competition.

Federal regulation of S&Ls is therefore not sufficiently pervasive for an implied exemption to the antitrust laws, and the courts have so held. *Central Savings and Loan Ass'n* v. *Federal Home Loan Bank Board,* 422 F.2d 504, 509 (8th Cir. 1970); *Kinee* v. *Abraham Lincoln Federal Savings and Loan Ass'n,* 365 F. Supp. 975, 982 (E.D. Pa. 1973).

An implied exemption to the antitrust laws will be found when Congress specifically provides that the regulatory agency should control a particular practice, even though that practice violates the antitrust laws. When Congress knows that the practice violates the antitrust laws, it must intend the [32] practice to continue under the close supervision of the regulatory agency when it specifically provides that the agency should control the practice, even though no

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Acts violate the FTC Act, *FTC* v. *Brown Shoe Co., Inc.,* 384 U.S. 316, 321 (1966). *Cf.* 15 U.S.C. 1802, in which the FTC Act is defined as an "antitrust law" in the Newspaper Preservation Act.

express antitrust exemption is provided. *Gordon* v. *NYSE,* 422 U.S. 659, 681-82, 685, 689 (1975); *United States* v. *NASD,* 422 U.S. 694, 721, 727, 729, 734 (1975). The implied intent to create an exemption from the antitrust laws could be found here by the Congressional direction that the FHLBB should regulate the practice of S&L/bank director interlocks. However, no such statute exists.[35]

Respondent argues that the FHLBB has already regulated S&L/bank director interlocks, and this Commission proceeding could result in conflicting requirements showing a "clear repugnancy between the antitrust laws and the regulatory system." *United States* v. *NASD,* 422 U.S. 694, 719-20 (1975).

[33] On August 18, 1976, the FHLBB issued guidelines on the subject of director interlocks. 12 C.F.R. 563.33; 41 F. R. 35811, 35821-22 (Aug. 24, 1976).[36] The guidelines, which became effective September 30, 1976, provide, *inter alia,* that:

> The following guidelines are recommended for composition of the board of directors of an insured institution:
>
> * * * * * * *
>
> (5)(i) No Director of an insured institution should be a director of any other financial institution . . . other than a commercial bank. . . .
>
> (ii) Not more than one-third of the directors of an insured institution should be directors of a commercial bank. . . .
>
> (iii) Not more than one director of an insured institution should be a director of the same commercial bank. . . .[37]

Respondent argues that these guidelines work an implied repeal of the Federal Trade Commission Act. Such an exemption will be implied if necessary to allow "the federal agency entrusted with regulation in the public interest [to] carry out that responsibility free from the disruption of conflicting judgments," *United States* v. *NASD,* 422 U.S. 694, 734 (1975). [34] In analyzing the impact of

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[35] Congress did empower the FHLBB to regulate interlocking directors of savings and loan *holding* companies. In the Savings and Loan Holding Company Amendments of 1967, 12 U.S.C. 1730a, Congress regulated the activities of S&L holding companies and gave the FHLBB specific authority over, *inter alia,* interlocking directorates. The Act makes it unlawful "except with prior approval of the [Federal Savings and Loan Insurance] Corporation" for any director, officer or 25 percent stockholder of an S&L holding company to serve as a director, officer or employee of another non-owned S&L holding company or S&L. 12 U.S.C. 1730(a)(i)(2). Under a savings clause, Congress provided that any such regulation by the FHLBB would *not* constitute a defense to a suit brought under the antitrust laws. 12 U.S.C. 1730(a)(1). This is the only statute in the regulatory scheme of the FHLBB which provides specific authority regarding director interlocks.

[36] Exhibit B to respondent's cross-motion.

[37] After these guidelines were announced, Mr. Joseph B. Danzansky and Dr. Lloyd H. Elliot resigned as directors of Perpetual. Mrs. Jean H. Sisco resigned as a director of the National Bank, and Mr. Thomas J. Owen resigned as a director of Union First. Stip. II, ¶ 20. By letter of October 1, 1976, the FHLBB's Acting General Counsel informed Perpetual that Perpetual was now in compliance with the director-interlock guidelines. Exhibit C to Perpetual's cross-motion.

Commission action on the regulatory authority of the FHLBB, the "proper approach . . . is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted." *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 357 (1963). Using this analysis, the courts have held that when an agency regulation does not mandate the conduct which is alleged to be a violation of the antitrust laws, there are no inconsistent and duplicative standards in allowing the antitrust challenge. *Cantor* v. *Detroit Edison Co.,* 44 U.S.L.W. 5357, 5361–62 (1976); *Kinee* v. *Abraham Lincoln Federal Savings & Loan Ass'n,* 365 F.Supp. 975, 981-82 (E.D. Pa. 1973).

The FHLBB guidelines, which were issued under its general supervisory authority,[38] do not require Perpetual to engage in S&L/bank interlocks. They merely recommend that such conduct may be permitted in certain circumstances.[39] The allegations of the Commission's complaint do not challenge all S&L/bank director interlocks engaged in by Perpetual but only those involving competing banks. Thus, Perpetual directors could also be directors of non-competing banks,[40] thereby avoiding challenge by the Commission and also following the recommendation of the FHLBB. Section 5 of the FTC Act and the guidelines promulgated by the FHLBB can in this way be reconciled.

[35] There is no indication of Congressional intent to provide an exemption for S&L/bank director interlocks from Section 5 of the FTC Act by the regulatory scheme of the FHLBB.

Respondent's Other Arguments

Respondent argues that the intent of Congress not to prohibit interlocks between banks and non-banks is indicated by legislative conduct since the passage of the Clayton and Federal Trade

[38] Under Section 5 of HOLA the FHLBB is vested with authority to make rules and regulations "to provide for the organization, incorporation, examination, operation, and regulation" of federal S&Ls. 12 U.S.C. 1464(a). Under NHA the Board has rulemaking authority to make "such bylaws, rules and regulations as it may prescribe for carrying out the purposes of this subchapter." 12 U.S.C. 1725(a).

[39] The savings and loan associations need not comply with these guidelines if they comply with disclosure regulations. 12 C.F.R. 563.45(a) and (b)(3); 41 F.R. 35824 (1976). "When . . . relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws." *Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 374 (1973).

[40] Interlocking directors are quite common between S&Ls and banks. *Amicus* Brief of National Savings and Loan League, pp. 5, 7. The qualifications for S&L directors have been described as calling for "successful businessmen [with] knowledge of business and finance in general and, more specifically, of real estate values, construction costs and lending operations." *Id.,* at p. 4 of attached affidavit. While a director of a bank might well fit that description, the record does not show that a director of a *competing* bank would be better qualified than a director of a non-competing bank to be a director of an S&L.

Commission Acts. Respondent points to several statutes specifically regulating director and officer interlocks in certain industries.[41] These statutes are clear evidence of Congressional intent to have a particular regulatory agency supervise the interlocks in a specific industry. This is the kind of proof of legislative intent that may create an implied exemption from the antitrust laws. *Gordon* v. *New York Stock Exchange,* 422 U.S. 659, 681–82, 685, 689 (1975), *supra.* Here, however, Congress has not specified that the FHLBB regulate S&L/bank interlocks. Respondent also points to statements in staff reports to Congressional committees which have stated in studies of Section 8 that it does not prohibit interlocks between banking organizations and other types of corporations.[42] " '[T]he views of a subsequent [36] Congress form a hazardous basis for inferring the intent of an earlier one.' " *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 348–49 (1963).[43] And the fact that this case is the first Commission challenge of an interlock solely under Section 5 is not proof of lack of power to do so.[44] *United States* v. *E. I. duPont deNemours & Co.,* 353 U.S. 586, 590 (1957); *United States* v. *Morton Salt Co.,* 338 U.S. 632, 647–48 (1950).

United States v. *Crocker National Corp.,* 1976–2 Trade Cases ¶ 61,044 (N.D. Cal. 1976)(appeal pending), decided, *inter alia,* that an interlocking directorate between a bank and an insurance company is exempt from the prohibition of Section 8 of the Clayton Act. The district court found the exemption in the fourth paragraph of Section 8: "[N]o person at the same time shall be a director in any two or more corporations . . . other than banks. . . ." The court held that "a normal reading of the statutory language 'two . . . corporations . . . other than banks' compels the conclusion that the statute applies only to two corporations, neither of which is a bank." *Id.* at p. 69,660. With all respect to the court, my reading of the statute leads

[41] *E.g.,* 49 U.S.C. 1379 (air carriers); 27 U.S.C. 208 (liquor companies); 47 U.S.C. 212 (telephone and telegraph companies).

[42] *E.g.* Staff Report to the Antitrust Subcommittee of the Committee on the Judiciary of the House of Representatives, Report on Interlocks in Corporate Management, 89th Cong., 1st Sess., 25 (1965). There is even greater evidence that subsequent Congresses deem that the Federal Trade Commission has jurisdiction over unfair or deceptive acts or practices by savings and loan associations and other financial institutions. H.R. Rep. No. 93–1606, 93d Cong., 2d Sess., 31 (1974); H.R. Rep. 93–1606, 93d Cong. 1st Sess., 29–31, 35–36 (1974).

[43] The passage and later repeal of Section 8A of the Clayton Act, Act of June 16, 1933, Pub. Law No. 66, Ch. 89, § 33, 48 Stat. 194, implies no legislative intent concerning S&L/bank interlocks, as argued by respondent. That statute supplemented the Clayton Act and was directed at vertical (noncompeting) interlocks by banks with firms in a business in which S&Ls have not been allowed to participate. Other amendments to Section 8 giving exemptions to noncompeting banks, cited by respondent, do not change the policy and thrust of that Act. Act of May 15, 1916, Ch. 120, 39 Stat. 121; Act of March 2, 1929, Ch. 581, 45 Stat. 1536.

[44] Respondent also cites the statement in Report of the Federal Trade Commission on Interlocking Directorates, H.R. Doc. No. 652, 81st Cong., 2d Sess. (1950) at p. 10, that [the industrial corporations provision of Section 8] "governs corporations engaged in commerce which are neither banks, banking associations, trust companies nor common carriers." That statement clearly did not focus on the problems of bank/non-bank interlocks, and, further, it is not binding. *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 348 (1963).

to a different conclusion. [37] The exemption for corporations "other than banks," to my mind, relates back to the first paragraph of Section 8 prohibiting interlocks between two or more banks. That paragraph provides that:

> *No* private banker or *director,* officer or employee *of any member bank* of the Federal Reserve System or any branch thereof *shall be at the same time a director,* officer, or employee *of any other bank,* banking association, savings bank, or trust company . . . except that the Board of Governors of the Federal Reserve System may by regulation permit such service as a director, officer, or employee of not more than one other such institution or branch thereof . . . . (Emphasis added.)

Since the first paragraph of Section 8 refers to Federal Reserve Board supervision of interlocks *between two banks,* the exclusion for banks in the fourth paragraph is consistent only if it means interlocks between two banks. The district court in *Crocker* recognized that its reading of the statute left bank/non-bank interlocks unregulated. The court failed to follow the presumption against construing a statute so as to render it ineffective. *FTC* v. *Retail Credit Co.,* 515 F.2d 988, 994 (D.C. Cir. 1975); *United States* v. *Blasius,* 397 F.2d 203, 207, n.9 (2d Cir. 1968), *cert. dismissed,* 393 U.S. 1008. The court focused on a single "member of a sentence" in the statute, failing to defer to "the provisions of the whole law and to its object and policy." *FTC* v. *Tuttle,* 244 F.2d 605, 613–14 (2d Cir. 1957), *cert. denied,* 354 U.S. 925.[45] When Section 8 of the Clayton Act is read as an integrated whole, *FTC* v. *Retail Credit Co.,* 515 F.2d 988, 995 (D.C. Cir. 1975), it does not speak of any legislative intent to create an exemption for S&L/bank interlocks.

[38] Since the plain meaning of the statute creates no exemption for S&L/bank interlocks, there was no need to consider the legislative history. *United States* v. *Oregon,* 366 U.S. 643, 648 (1961). The court in *Crocker* went on, however, to examine bits and pieces of the legislative history of the statute, hoping to find support. This was unnecessary and unreliable. *United States* v. *Sears, Roebuck & Co.,* 111 F.Supp. 614, 619 (S.D.N.Y. 1953). For support of its views, the court also relied on the "hazardous basis" of the subsequent views of congressmen,[46] *supra. United States* v. *Philadelphia National Bank,* 374 U.S. 321, 348–49 (1963). And the court relied on the administrative interpretation of the statute. Administrative interpretation of a statute, or the failure to bring action under it for many years, does not change the legislative intent, *supra. United States* v. *E. I. duPont*

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[45] See also, *NLRB* v. *Lion Oil Co.,* 352 U.S. 282, 288 (1957); *Mastro Plastics Corp.* v. *NLRB,* 350 U.S. 270, 285 (1956); *United States* v. *American Trucking Ass'ns, Inc.,* 310 U.S. 534, 542–43 (1940). See also, *FTC* v. *Bowman,* 248 F.2d 456 (7th Cir. 1957), which followed the *Tuttle* case.

[46] Some of the legislative history relied on refers to vertical interlocks allowing representatives of banks to sit on the boards of debtor corporations, which is an irrelevant consideration to the issue here.

deNemours & Co., 353 U.S. 586, 590 (1957); *United States* v. *Morton Salt Co.*, 338 U.S. 632, 647–48 (1950).[47]

Respondent argues that, because the FTC lacks jurisdiction over banks in Section 5, the attempt to stop S&L/bank director interlocks by proceeding against only the S&L is in derogation of the statute. Since two parties are involved in the relationship, respondent argues that the Commission cannot sue only one of them. Respondent finds further support for this argument in the holding in *Crocker* that interlocking directors between industrial corporations are prohibited by Section 8 of the Clayton Act only when neither is a bank. The court there, however, specifically reserved the question of whether a director interlock between an industrial corporation and a bank violates Section 5 of the FTC Act. *Id.*, at p. 69,671, n.23. Furthermore, the Supreme Court on numerous occasions has held contracts illegal under the antitrust laws even though only one party to the contract was joined in the suit. *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972); *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967); *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967); *United States* v. *Schine Theaters*, 334 U.S. 110 (1948); *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); *United States* v. *Univis Lens Co.*, 316 U.S. 241 (1942); *Ethyl Gasoline Corp.* v. *United States*, 309 [39] U.S. 436 (1940); *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208 (1939); *Paramount Famous Lasky Corp.* v. *United States*, 282 U.S. 30 (1930). The Commission can exercise its discretion in choosing to proceed against only Perpetual. *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411 (1958).

Respondent also argues that Section 8 of the Clayton Act is directed at individuals and not corporations, and that the complaint here is improperly addressed to it. This complaint is under Section 5 of the FTC Act which is not restricted to individuals, but even Section 8 is "properly construed to prohibit corporations as well as individuals from effecting interlocking directorates." In re *Kraftco Corp.*, Vol. 3 CCH Trade Reg. Rep. ¶ 21,263, at p. 21,169 (Final Order issued January 11, 1977 [89 F.T.C. at 63]). And respondent's argument that the directorates here are the individual acts of the directors, and not corporate acts, is without merit. "[T]he corporation surely has sufficient interest in the legality of its directors' tenure" to be responsible for the legality of practice. *Protectoseal Co.* v. *Barancik*, 484 F.2d 585, 588 (7th Cir. 1973).

[47] The court also relied on a 1970 statement by Mr. Arthur Burns, Chairman of the Federal Reserve Board, as supporting interlocking directorates. *Id.*, at p. 9. Mr. Burns' current view of bank/S&L interlocks, *supra*, is clearly no support for an exemption here.

Primary Jurisdiction

Primary jurisdiction is a doctrine which is applied when a regulatory agency's determination of issues of fact will be material aid to resolution of an antitrust suit. *Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. 289, 305–06 (1973). The doctrine differs from exclusive jurisdiction in that it calls for suspension of the antitrust claims pending the agency determination, rather than dismissal. Primary jurisdiction:

> comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such case the judicial process is suspended pending referral of such issues to the administrative body for its views. [*United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59, 64 (1956).]

The issues to be resolved in this case have nothing to do with the special competence of the FHLBB to regulate the savings and loan industry. It is irrelevant here whether Perpetual has violated statutes enforced by that agency. The issue in this case is whether Perpetual has violated Section 5 of the Federal Trade Commission Act by engaging in director interlocks with three competing banks. Resolution of the issue involves an [40] analysis of the history and language of the FTC Act and other antitrust provisions. It is the FTC and not the FHLBB which should perform this function. A determination of the legality of the interlocks under the statutes administered by the FHLBB would not be of "material aid" to the Commission, *Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. at 302. Congress has directed the FHLBB to prevent unsafe financial practices by S&Ls. That finding by the FHLBB would have no effect on the issue of whether the practice violates the FTC Act. Deferring to the FHLBB for findings of fact would not obviate the necessity to litigate the antitrust issues. Therefore, the doctrine of primary jurisdiction need not be invoked. *Aloha Airlines, Inc.* v. *Hawaiian Airlines, Inc.*, 489 F.2d 203, 211 (9th Cir. 1973).[48]

Furthermore, the FHLBB has already acted by issuing guidelines on August 18, 1976, regarding S&L/bank director interlocks. 41 F.R. 35811 (August 24, 1976).[49] Once the regulatory agency has acted with respect to the practice at which the antitrust challenge has been directed, the doctrine of primary jurisdiction no longer applies.

[48] Since part of the competitive impact of the S&L/bank interlocks could be on the banking business, FHLBB's expertise in S&Ls is not applicable. *Foremost International Tours, Inc.*, v. *Quantas Airways Ltd.*, 525 F.2d 281, 285 (9th Cir. 1975), *cert. denied.*

[49] The guidelines were issued three months after the complaint in this proceeding, and the FHLBB considered the Commission proceeding when it adopted the guidelines. See *Federal Home Loan Bank Board News*, at p. 4 (Aug. 20, 1976).

United States v. *Philadelphia National Bank*, 374 U.S. 321, 353 (1963). [41]

PREJUDGMENT

Respondent argues that a Commission policy statement dated August 3, 1976, 41 F.R. 35573–74, concerning S&L/bank interlocks is evidence that the Commission has prejudged the merits of this proceeding.

The statement clearly indicates that it is intended "to provide general guidance and information;" that it "may be superceded or amended by subsequent Commission action without prior notice;" and that "the Commission has made no determination on the merits that Perpetual . . . has actually violated the law." The statement does not create any present obligation for the directors to resign. *Courshon* v. *FTC*, (D.D.C. January 28, 1977), BNA Antitrust & Trade Reg. Rep. #800.

The statement merely explains the reasons why individual interlocked directors were not named as respondents in this proceeding and announces a grace period before any individual director of a savings and loan association would be charged with a violation, in order to avoid disrupting the orderly management of S&Ls by a mass resignation of directors. This statement was not an indication of prejudgment of the issues in this proceeding. *FTC* v. *Cement Institute*, 333 U.S. 583, 701 (1948).

IV

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction over Perpetual and the subject matter of this proceeding.

2. This proceeding is in the public interest.

3. By the nature of their businesses and the locations of their operations as hereinabove described, Perpetual and American Security are competitors of each other; Perpetual and National Bank are competitors of each other; and Perpetual and Union First are competitors of each other.

4. The elimination, by agreement or otherwise, of competition between Perpetual and American Security, between Perpetual and National Bank, or between Perpetual and Union First would constitute a violation of the antitrust laws.

5. Each of the four interlocks listed in paragraphs 5, 6, 9 and 11 of the findings was an unfair act, practice and method of competition in or affecting commerce and therefore constitutes a violation of

Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by Perpetual.

[42] 6. Each of the interlocks listed in findings 7, 8 and 10 is an unfair act, practice and method of competition in or affecting commerce and therefore constitutes a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by Perpetual.

7. An order to cease and desist against Perpetual is appropriate, supported by the findings of fact and is necessary for the protection of the public interest.

Accordingly, complaint counsel's Motion For Summary Decision is granted.[50]

V

ORDER

Respondent's main objection to the order proposed by complaint counsel, which I adopt almost verbatim, is that paragraph III of the order prohibits Perpetual from having interlocks with competitors through directors, officers or affiliated persons.[51] Respondent objects that the order is too broad and that there has been no proof of a violation by an officer or affiliated person.

The basis for proposing an order prohibiting officer interlocks is that officers have even a greater potential for anticompetitive transfer of information and agreements [43] than directors. Since the officer has more knowledge of the day-to-day affairs of the company, and because his remuneration is often based on the success of the company, there is a greater incentive to fix rates, allocate markets and restrain competition with competitors.[52] While there is no proof of such activity on this record, the "fact that this has not happened up to the present does not mean that it may not happen hereafter."[53] Furthermore, two of the interlocked directors of

[50] Respondent's cross-motion is denied. All other pending motions are denied, except to the extent that they are granted by the necessary effect of this opinion and order. The affidavits and exhibits submitted by the parties to the extent not adopted by this decision, are rejected as unreliable or immaterial.

[51] The basis for extending the order to "affiliated" persons is that the chairman of the board of Perpetual is the father of the president, and Jean H. Sisco, who resigned as director of National Bank on September 16, 1976, is married to and resides with Joseph J. Sisco, who became a director of National Bank on February 10, 1977. (The facts concerning the latter relationship were established by a letter from counsel to National Bank. While an affidavit of one of the Siscos would be better evidence, the letter is reliable enough. *Dallas County* v. *Commercial Union Assurance Co.*, 286 F.2d 388 (5th Cir. 1961).)

Thornton W. Owen is also now a director emeritus of a competing bank. Thus the definition of "director" in the order includes such directors. The potential for anticompetitive exchange of information between competitors exists whether the director can vote or sits only as an advisor in the closed director meetings.

[52] "The operating official of a particular concern is likely to be the most aggressive in using his directorships in other related concerns to establish a close harmony of interest with those enterprises." *Report of the FTC on Interlocking Directorates, supra*, at p. 22.

[53] *United States* v. *Sears, Roebuck & Co.*, 111 F. Supp. 614, 620 (S.D.N.Y. 1953) (Weinfeld, J.). The respondent relies on this case but cites language not used by the court. Cross-motion at p. 158.

Perpetual, Thornton W. Owen and Thomas J. Owen, are also officers of Perpetual. If they remained officers but resigned as directors of Perpetual and remained as directors of the competing banks, they might evade the Commission Order merely prohibiting interlocking directors, but the possibility for anticompetitive exchange of information and illegal agreements would remain. The Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952). Having been caught violating the Act, respondent "must expect some fencing in." *FTC* v. *National Lead Co.*, 352 U.S. 419, 431 (1957).

Perpetual, the largest savings and loan association in Washington, D.C., has had seven of its eleven[54] directors on the boards of three of the four largest competing banks in the city. The resignation of four of the directors came only after the complaint in this proceeding was issued and the FHLBB issued its guidelines.[55] Perpetual's disregard for possible conflicts in interest and anticompetitive agreements and exchange of information which might occur through this arrangement indicates that a broad order should issue. The relief in the order is reasonably related to the unlawful practice proven in this proceeding. *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 612–13 (1946). [44]

I

It is ordered, That the following definitions shall apply in this order:

(a) "Business organization" means any person, partnership, corporation (as that term is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44) or other business entity.

(b) "Demand deposits" are deposits which are withdrawable on demand and on which no interest is paid.

(c) "Director" includes voting members of boards of directors, nonvoting members of boards of directors, advisory directors, and emeriti directors.

(d) "Financial services" means all services and related products presently or hereafter offered, sold, leased, or otherwise provided by savings and loan associations, banks, insurance companies, mutual savings banks and other financial institutions or business organizations including, but not limited to the solicitation and maintenance of demand, savings and time deposits or accounts; residential loans; other mortgage loans and all other types of loans; financial

[54] "The more numerous the interlocks, the stronger is the presumption that they create unity of action." *Report of the FTC on Interlocking Directorates*, *supra*, at p. 18.

[55] The resignations do not make this case moot. *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632 (1953).

counseling; tax preparation; personal trust services; retirement accounts; and direct deposit services.

(e) "Affiliated person" means the spouse, father, mother, son, daughter, brother, sister or any person who has the same home or business office as that person. The definitions of "parent" and "sister" contained in definitions I(g) and I(j) of this order are not applicable to this definition of "affiliated person." [45]

(f) "Officer" includes, but is not limited to, any person considered to be an officer by the business organization, any person with managerial responsibility in the business organization, or any person who is a member of any managerial or operating committee of the business organization.

(g) "Parent" of a business organization means any other business organization which owns or controls 50 percent or more of the voting stock of such business organization.

(h) "Residential loans" are loans secured by mortgages or other liens on non-farm property containing 1–4 dwelling units.

(i) "Savings" includes all savings accounts, savings deposits, passbook savings accounts, and savings deposit accounts offered by any business organization.

(j) "Sister" of a business organization means any business organization of which more than 50 percent of the voting stock is held by the same business organization which owns or controls 50 percent or more of the voting of the subject business organization.

(k) "Subsidiary" of a business organization means any business 50 percent or more of the voting stock of which is owned or controlled directly or indirectly, by such business organization.

(l) "Time deposits" are all deposits, including certificates of deposit, that are not demand deposits or savings.

II

It is further ordered, That for purposes of this order, a business organization, including Perpetual Federal Savings and Loan Association ("Perpetual") and any business organization which shares a common director or officer with Perpetual, shall be deemed to be engaged in the provision of financial services, if any parent, subsidiary, or sister of such business organization is so engaged. [46]

III

It is further ordered, That upon this order's becoming final respondent Perpetual, its successors and assigns, do forthwith cease

and desist from having, and in the future shall not have any individual to serve as a director or officer who either:

(a) is or would be at the same time a director or officer of Perpetual, and who is a director, officer, or affiliated person of a director or officer of American Security and Trust Company ("American Security"), National Bank of Washington ("National Bank"), Union First National Bank of Washington ("Union First") or any other organization engaged in the provision of financial services, so long as Perpetual and either American Security, National Bank, Union First or such other business organization are in competition; or

(b) fails to submit to Perpetual any statement required by Paragraph IV of this order.

IV

It is further ordered, That within thirty (30) days of the date of service of this order and prior to each election of directors or to the solicitation of proxies for such election, whichever is earlier, hereafter, Perpetual shall obtain a written statement from each officer and each member of its board of directors (except directors whose terms expire at the next election and who are not standing for re-election) and from each nominee for a directorship (who is not then a director) showing: [47]

(a) the name and home mailing address of each director, officer or nominee; and

(b) the name and principal office mailing address of, and a description of each product or service produced or sold by, each business organization in which each such person or his or her affiliated person then serves as a director or officer, or has been nominated as a director.

Nothing in this paragraph shall be construed to relieve respondent of its obligation under Paragraph III(a) hereof due to any error or omission contained in any written statement received pursuant to this paragraph.

V

It is further ordered, That within forty-five (45) days of the date of service of this order and annually for a period of ten (10) years thereafter, Perpetual shall file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order. Copies of the statements obtained pursuant to Paragraph IV of this order shall be submitted to the Commission as

part of the reports of compliance required by this paragraph. Nothing in this paragraph shall relieve Perpetual of its obligation to comply with Paragraphs II, III, and IV of this order once it is no longer required to submit reports of compliance to the Commission. [48]

VI

It is further ordered, That in the event that the process of review required by Paragraph IV hereof discloses the existence of competition between Perpetual and any other business organization, Perpetual shall not permit the service as director or officer of any person who remains, or who has an affiliated person who remains, as an officer, director, or nominee for director of that business organization. Perpetual shall be allowed a reasonable period of time, but in no event longer than ninety days from the date of such disclosure, within which to take any legal or other steps necessary to secure compliance with this order, including requiring any Perpetual director or officer to resign from Perpetual or such other business organization forthwith or, in the case of a nominee, to forthwith remove his or her name from nomination.

VII

It is further ordered, That the provisions of Paragraphs III through VI hereof shall not apply where the interlocked business organization is Perpetual's (1) parent, (2) sister, or (3) subsidiary. [49]

VIII

It is further ordered, That Perpetual shall give the Commission at least thirty (30) days prior notice of any change in the corporation such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of a parent, sister or subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

DISSENTING OPINION OF COMMISSIONER COLLIER

I concur in the majority's conclusion that these interlocking directorates must be measured by the standard of Section 5 of the FTC Act which prohibits, among other things, unfair methods of competition. I dissent, however, from the Commission's holding that a violation has been proved and I would remand the case for further hearings.

The majority holds that a director interlock between competing

corporations constitutes a *per se* violation of Section 5. This rule is consistent with the standard of liability for such arrangements that is embodied in Section 8 of the Clayton Act. By its terms, however, Section 8 does not reach the instant transaction.

It is now familiar doctrine that the potential reach of Section 5 may exceed the limitations of the Sherman and Clayton Acts. *E.g., FTC* v. *Brown Shoe Co.*, 384 U.S. 316, 321–22 (1966); *Grand Union Co.* v. *FTC*, 300 F.2d 92 (2d Cir. 1962). "[L]egislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."[1] *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972). In my view, however, the Commission's invocation of a *per se* rule of Section 5 liability for director interlocks is an unwise exercise of this extremely broad grant of statutory authority.[2]

[2] This case involves the discovery of neither a new form of business conduct nor familiar conduct in the context of new circumstances. Compare *FTC* v. *Sperry & Hutchinson, supra*, at 240–44. Even more importantly, the majority's rule is not based on independent evidence or other facts indicating that director interlocks between companies that compete to any extent are likely to cause consumer injury. Rather, the majority's interpretation of Section 5 relies heavily upon the policies underlying Section 8 of the Clayton Act. One difficulty with that approach is that the Congress which enacted this provision apparently did not regard these policies as absolute, as it did not include within the coverage of Section 8 the class of interlock that this case represents.

Another difficulty with the majority's decision to establish a rule of *per se* illegality is that this approach ignores the recent teaching of *Continental TV, Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (June 23, 1977):

> *Per se* rules thus require the Court to make broad generalizations about the social utility of particular commercial practices. The probability that anticompetitive consequences will result from a practice and the severity of those consequences must be balanced against its procompetitive consequences. Cases that do not fit the generalization may arise, but a *per se* rule reflects the judgment that such cases are

[1] Although this statement immediately follows a discussion of the Wheeler-Lea Amendment, 52 Stat. 111, to the FTC Act, its context makes clear its application to "unfair methods of competition."

[2] Further sources of Commission liberty in assessing business conduct are found in the general and established doctrines of judicial deference on review of administrative agency decisions. For example, under 5 U.S.C. 556 and 706, Commission findings of fact are affirmed if supported by substantial evidence on the whole record; and, under the doctrine of *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965), the Commission's interpretations of its own statute are entitled to great weight.

not sufficiently common or important to justify the time and expense necessary to identify them. Once established, *per se* rules tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system of the more complex rule of reason trials, *see Northern Pac. R. Co.* v. *United States*, 356 U.S. 1, 5 (1958); *United States* v. *Topco Associates*, 405 U.S. 596, 609–10 (1972), but those advantages are not sufficient in themselves to justify the creation of *per se* rules. If it were otherwise, all of antitrust law would be reduced to *per se* rules, thus introducing an unintended and undesirable rigidity in the law. 433 U.S. at 50 n. 16.

We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a "pernicious effect on competition and lack. . .any redeeming virtue" (*Northern Pac. R. Co.* v. *United States, supra*, p. 5) and therefore should be classified as *per se* violations of the Sherman Act. [Quoting from *White Motor Co.* v. *U.S.*, 372 U.S. 253 (1963).]

[3] It seems to me that these admonitions directed at courts in Sherman Act cases are no less salient when applied to the Commission in cases arising under Section 5. Certainly the Commission's authority to ignore this counsel is not a reason to do so.

It is, of course, arguable that the Commission enjoys a relative advantage over federal courts in fashioning *per se* rules. Our more frequent exposure to antitrust issues and varying factual situations, as well as our reservoir of economic analysts, equip us well to consider the adoption of such rules. Our authority to conduct broad investigations into business practices[3] and to initiate rulemaking proceedings[4] certainly complement this potential for enlightened lawmaking in the public interest.[5]

With regard to the class of transactions covered by the *per se* rule of this case, however, we can claim none of these advantages. Our prior experience with director interlocks has been acquired in the *per se* context of Section 8. We therefore know little of the effects of these arrangements and even less of their consequences when employed by financial institutions. At most, we have gained some experience in framing remedial orders.[6]

In the absence of a factual foundation for inferring public injury and in cases such as this one that are outside the terms of a statutory *per se* rule, I would turn for policy guidance to the controlling standard of Section 7 of the Clayton Act. In my view, arrangements such as the one before us should be declared unlawful if their effects "may be substantially to lessen competition. . .in any line of

[3] 15 U.S.C. 46.

[4] *National Petroleum Refiners Ass'n.* v. *FTC*, 482 F.2d 672 (1973), *cert. denied*, 415 U.S. 951 (1974).

[5] 15 U.S.C. 45.

[6] *See, e.g.*, our recent orders in *Addressograph-Multigraph*, Dkt. 9084 [*TRW, Inc., et al.*, 90 F.T.C. 144]; *Kane-Miller Corp., et al.*, Dkt. 9034 [88 F.T.C. 279]; *International Business Machines Corp.*, Dkt. C–2864 [89 F.T.C. 91]; and *Kraftco Corp.*, Dkt. 9035 [89 F.T.C. 46].

commerce in any section of the country. . ." While the antitrust [4] laws are not without anomalies,[7] I would not employ our discretion to proliferate new ones. And it is at least anomalous to me that a showing of competitive injury should be required for illegality when two corporations become one but not when they share a director. That this result is commanded in situations covered by Section 8 is no reason to extend the anomaly to situations that are not.

While it might be argued in response that the social cost of limiting the supply of eligible directors is less than that of prohibiting mergers that cannot be expected to cause discernible injury to competition, I know of no basis for such a conclusion.[8] Moreover, there is every reason to suppose that the presence of an interlocked director poses less threat to competition than does a permanent and complete union of the firms.

Because anticompetitive effects were neither alleged or proved in this case, I would amend the complaint and remand the case for further proceedings.

Opinion of the Commission

By Pertschuk, *Commissioner:*

The principal issue presented in this proceeding is whether a savings and loan association is engaged in an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by having on its board of directors individuals who serve simultaneously as directors of competing commercial banks. We hold that such conduct violates Section 5.

The complaint in this matter, issued May 13, 1976, as amended on June 29, 1976, charged respondent Perpetual Federal Savings & Loan Association ("Perpetual") with having violated Section 5 by virtue of its having had on its board of directors seven individuals, each of whom served simultaneously at some point as a director of one of three commercial banks in Washington, D.C. The complaint alleged that each of the banks competed with Perpetual so that the elimination, by agreement or otherwise, of competition between Perpetual and each bank would constitute a violation of the

[7] For recent examples, see the diverse treatment of price and non-price vertical restrictions in the majority's opinion in *GTE Sylvania, supra,* n. 17 and accompanying text, as well as Justice White's comment on this distinction, n. 10 and accompanying text. See also the Third Circuit's decision in *U.S.* v. *U.S. Gypsum Co.,* 550 F.2d 115, 120–127 (1977), *cert. granted,* October 3, 1977, No. 76–1560, allowing, as a defense to a horizontal price-fixing allegation, the argument that communications concerning prices were necessary to avoid violations of the Robinson-Patman Act. See generally R. Bork & W. Bowman, *The Goals of Antitrust: A Dialogue on Policy,* 65 Colum. L. Rev. 363 (1965). Compare R. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division,* 74 Yale L. J. 775, 830 (1965).

[8] One might, however, infer the low costs of regulating directorships from both the relatively modest compensation of directors and from the readiness with which corporate respondents have usually been prepared to settle Section 8 cases.

antitrust laws. After the filing of a stipulation of facts, complaint counsel moved for summary decision, and respondent filed a cross-motion for summary decision. In addition to the filings of the parties, the National Savings & Loan League filed an *amicus* brief. On March 28, 1977, Administrative Law Judge ("ALJ") James P. Timony entered an initial decision sustaining the complaint, accompanied by a thoughtful, well-reasoned opinion, and recommended entry of an order to cease and desist. Respondent has appealed from the ALJ's decision. The National Savings and Loan League and the United States League of Savings Associations have filed *amicus curiae* briefs urging reversal.

[2] Judge Timony found that Perpetual and the banks competed with one another in, *inter alia*, the solicitation and maintenance of savings and the solicitation and financing of residential loans (ID 18–23).[1] He concluded that the interlocks were unfair methods of competition in violation of Section 5 of the FTC Act (ID pp. 41–42) on the ground that they violated the policy of Section 8 of the Clayton Act (ID p. 16) and constituted incipient violations of Section 1 of the Sherman Act (ID p. 17).[2]

The ALJ's order directed Perpetual to cease and desist from having as a director or officer anyone who simultaneously serves as a director, officer, or "affiliated person"[3] of a director or officer of any of the three banks named in the complaint, "or any other organization engaged in the provision of [3] financial services,[4] so long as Perpetual and [the banks] or such other business organization are in competition;" or who fails to submit a required statement listing all business organizations in which such person (or his affiliated person) is a director or officer, and the products or services produced or sold by such businesses (ID pp. 46–47).

Perpetual's contentions on appeal fall into three major categories: that its interlocks do not violate Section 5; that the FTC lacks jurisdiction over the subject matter of the proceeding; and that, in

[1] The following abbreviations are used throughout this opinion:
ID – Initial Decision, with paragraph references to Findings of Fact
ID p. – Initial Decision, with page references
RAB – Respondent's Appeal Brief
RRB – Respondent's Reply Brief

[2] The ALJ rejected complaint counsel's contention that Perpetual's interlocks violated Section 5 for the additional reason that they contravened other "public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws", *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972)(ID p. 19).

[3] The order defines "affiliated person" as the spouse, father, mother, son, daughter, brother, or sister of any person who has the same home or business office as that person. Order Correcting Clerical Error, June 14, 1977.

[4] The order defines "financial services" as "all services and related products presently or hereafter offered, sold, leased, or otherwise provided by savings and loan associations, banks, insurance companies, mutual savings banks and other financial institutions or business organizations including, but not limited to the solicitation and maintenance of demand, savings and time deposits or accounts; residential loans; other mortgage loans and all other types of loans; financial counseling; tax preparation; personal trust services; retirement accounts; and direct deposit services" (ID p. 44).

the event a violation over which the Commission has jurisdiction is found, the order issued by the ALJ is impermissibly broad.[5]

FACTS

Perpetual is the largest federal savings and loan association ("S&L") in the metropolitan Washington, D.C., area. It has capital, surplus, and undivided profits exceeding $71 million (ID 1). As of December 31, 1975, [4] it had savings amounting to more than $682 million and residential loans[6] of more than $565 million. Perpetual had, at the time the initial decision was issued, 9 offices, and had received permission to open a tenth (ID 14).

The three banks involved in this case, American Security and Trust Company ("American Security"), National Bank of Washington ("National Bank"), and Union First National Bank of Washington ("Union First"), are all commercial banks in Washington, D.C.[7] American Security has capital, surplus and undivided profits aggregating more than $89 million, and is the second largest bank in Washington, D.C., with 30 offices in the city (ID 2, 15). As of December 31, 1975, it had savings of more than $189 million and residential loans of more than $79 million (ID 15). National Bank has capital, surplus and undivided profits aggregating more than $42 million, and is the third largest bank in Washington, D.C., with 25 offices in the city (ID 3, 16). As of December 31, 1975, it had savings of more than $101 million, and residential loans of more than $42 million (ID 16). Union First has capital, surplus and undivided profits aggregating more than $37 million, and is the fourth largest bank in Washington, D.C., with 19 offices in the city (ID 4, 17). As of December 31, 1975, it had savings of more than $88 million, and residential loans of more than $68 million (ID 17).

At the time the amended complaint herein issued, Perpetual had on its board one director who served [5] simultaneously as a director of American Security[8] (ID 7), three directors who served simulta-

[5] Respondent also argues that the Commission has prejudged the case. This contention is dealt with, and rejected, *infra*.

[6] Residential loans are defined as loans secured by a mortgage or other lien on non-farm property containing 1–4 dwelling units (ID 12).

[7] All three are "banks" within the meaning of Section 8 of the Clayton Act, 15 U.S.C. 19, and Section 5 of the FTC Act, 15 U.S.C. 45. (ID 2–4) While the banks are beyond the Commission's jurisdiction, that fact does not affect the Commission's ability to adjudicate the legality of Perpetual's interlocks and to issue an order against Perpetual. It is not necessary to join in the suit all parties to an illegal arrangement. *See* cases cited at ID pp. 38–39.

[8] Another Perpetual director, Thornton W. Owen, who is chairman of the board and chief executive officer of Perpetual, was also a director of American Security from 1947 until April 20, 1976, at which time his status with American Security changed to that of a director emeritus. Directors emeriti have no voice in management, although they may attend and speak at board meetings, and are entitled to receive certain documents which are made available to the board (ID 10). Their role is largely honorary in nature.

Another director of American Security had served simultaneously on Perpetual's board for some time prior to the issuance of the complaint (ID 6).

neously as directors of National Bank (ID 5, 8, 11), and one director, its president, who served simultaneously as a director of Union First (ID 9).

On August 18, 1976, subsequent to the issuance of the complaint in this proceeding, the Federal Home Loan Bank Board, which exercises certain regulatory authority over S&L's such as Perpetual, issued guidelines on the subject of director interlocks. 12 C.F.R. 563.33 (1977). These guidelines, which became effective September 30, 1976, provide, *inter alia*, that:

> The following guidelines are recommended for composition of the board of directors of an insured institution:
>
> * * * * * * *
>
> (5)(i) No director of an insured institution should be a director of any other financial institution or holding company affiliate thereof, other than a commercial bank or trust company.
>
> (ii) Not more than one-third of the directors of an insured institution should be directors of a commercial bank, trust company, or holding company affiliate of such a bank or company. [6]
>
> (iii) Not more than one director of an insured institution should be a director of the same commercial bank, trust company, or holding company affiliate of such a bank or company.[9]

After these guidelines were announced, two directors resigned from Perpetual's board, and two other Perpetual directors resigned from bank boards on which they served (ID p. 33 n. 37). However, Perpetual remains interlocked with American Security and National Bank.

Perpetual and the three banks are governed by their respective boards of directors, each of which has the ultimate decisionmaking authority regarding matters affecting its institution. Such matters include, but are not limited to, selection of officers to manage the institution, establishment of earnings or interest rates payable on savings and interest rates and other terms for residential loans, and selection of and application for additional branch facilities (ID 27).

Perpetual, American Security, National Bank and Union First are all engaged and compete in the solicitation and maintenance of savings, either in the form of savings accounts or savings deposit accounts, and the financing of residential loans in the Washington, D.C., area (ID 14–19). While these particular financial services may

[9] These "recommended guidelines" have no prohibitory force or effect. While they will be used in the future as "conditions of insurance" for newly insured federal S&L's, which might strongly encourage compliance by such institutions, that would not apply to a long-established institution such as Perpetual. *See* 41 F.R. 35,812 (1976). The only effect on Perpetual of non-compliance with these guidelines would be to deny it one of several exemptions to certain disclosure requirements which otherwise apply to insured institutions. *See* 12 C.F.R. 536.45(a), (b)(3) (1977).

not represent as large a share of the banks' business as they do of Perpetual's, they remain a substantial portion of the banks' activities. For example, residential loans amount to more than 14 percent of the total assets of Union First, and more than 7 percent of the total assets of American Security and National Bank. Savings constitute more than 19 percent of the total [7] liabilities of National Bank and Union First, and more than 18 percent of the total liabilities of American Security (ID 15–17). These multi-million dollar figures could in no way be termed *de minimis* amounts.[10] In addition, the average dollar amounts of the residential loans made by Perpetual and the three banks are roughly the same (ID 20).

In short, Perpetual and the three banks are clearly substantial competitors, and the elimination of competition by agreement between Perpetual and any of the banks would violate the antitrust laws. Since there is no genuine issue of material fact as to the existence and substantiality of this competition, it was appropriate for the ALJ to decide the matter on a motion for summary decision.[11]

S&L/Bank Interlocks as an Unfair Method of Competition

> The practice of interlocking directorates is the root of many evils. It offends laws human and divine. Applied to rival corporations, it tends to the suppression of competition and to violation of the Sherman law. L. Brandeis, *Other People's Money* 51 (1914).

It is beyond cavil that if conduct "runs counter to the public policy declared in the Sherman and Clayton Acts, the Federal Trade Commission has the power to suppress it as an unfair method of competition." [8] *Fashion Originators' Guild* v. *FTC,* 312 U.S. 457, 463 (1941). *See also, e.g., FTC* v. *Brown Shoe Co.,* 384 U.S. 316 (1966); *Atlantic Refining Co.* v. *FTC,* 381 U.S. 357 (1965); *FTC* v. *Motion Picture Advertising Service Co.,* 344 U.S. 392 (1953); *FTC* v. *Cement Institute,* 333 U.S. 683, 691 (1948). Section 5 has been applied in this manner to declare interlocking directorates to be unfair methods of competition. *Kraftco Corp.,* 89 F.T.C. 46, 63–64 (1977). Since Perpetual's interlocks violate the policy of Section 8 of the Clayton Act, as will be shown, they violate Section 5.

Section 8 of the Clayton Act, 15 U.S.C. 19, clearly enunciates a strong Congressional policy disfavoring interlocking directorates.

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[10] "The fact that this volume . . . may represent but a small percentage . . . does not militate against the undesirability of directorates common to both corporations." *United States* v. *Sears, Roebuck & Co.,* 111 F. Supp. 614, 620 (S.D.N.Y. 1953). See also *Protectoseal Co.* v. *Barancik,* 484 F.2d 585, 587 (7th Cir. 1973); *Kraftco Corp.,* 89 F.T.C. 46, 65 (1977).

[11] Perpetual and the three banks all engage in "commerce" and conduct their business, including the activities of their boards of directors, in or affecting "commerce," within the meaning of Section 4 of the FTC Act, 15 U.S.C. 44 (ID 26).

The so-called "industrial corporations" paragraph contains the following absolute prohibition:

[N]o person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, *other than banks*, banking associations, trust companies, and common carriers subject to the Act to regulate commerce . . . if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws (emphasis added).

Other provisions of Section 8 deal specifically with interlocks between certain types of financial institutions. The statute outlaws these interlocks as well, but authorizes the Federal Reserve Board, which exercises general supervisory power over banking, to permit certain interlocks by regulation:

No private banker or director, officer, or employee of any member bank of the Federal Reserve System or any branch [9] thereof shall be at the same time a director, officer, or employee of any other bank, banking association, savings bank, or trust company organized under the National Bank Act or organized under the laws of any State or of the District of Columbia, or any branch thereof, except that the Board of Governors of the Federal Reserve System may by regulation permit such service as a director, officer, or employee of not more than one other such institution or branch thereof. . . .[12]

[10] The last clause was specifically inserted to conform with the then-recently enacted Federal Reserve Act, and cannot be taken as general Congressional approval of interlocks between competing financial institutions. *See* S. Rep. No. 698, 63d Cong., 2d Sess. 15 (1914).

Congress enacted the Clayton Act and the Federal Trade Commission Act in response to the perceived shortcomings of the Sherman

[12] The statute further provides that the foregoing prohibition on interlocks does not apply to the following:

(1) A bank, banking association, savings bank, or trust company, more than 90 per centum of the stock of which is owned directly or indirectly by the United States or by any corporation of which the United States directly or indirectly owns more than 90 per centum of the stock.

(2) A bank, banking association, savings bank, or trust company which has been placed formally in liquidation or which is in the hands of a receiver, conservator, or other official exercising similar functions.

(3) A corporation, principally engaged in international or foreign banking or banking in a dependency or insular possession of the United States which has entered into an agreement with the Board of Governors of the Federal Reserve System pursuant to sections 601 to 604a of Title 12.

(4) A bank, banking association, savings bank, or trust company, more than 50 per centum of the common stock of which is owned directly or indirectly by persons who own directly or indirectly more than 50 per centum of the common stock of such member bank.

(5) A bank, banking association, savings bank, or trust company not located and having no branch in the same city, town or village as that in which such member bank or any branch thereof is located, or in any city, town, or village contiguous or adjacent thereto.

(6) A bank, banking association, savings bank, or trust company not engaged in a class or classes of business in which such member bank is engaged.

(7) A mutual savings bank having no capital stock.

Act, as interpreted by the courts, in abating what were seen as unhealthy concentrations of economic and political power. One of the practices which was singled out for particular concern was the interlocking directorate. This concern was highlighted in Congressional reports. See *Investigation of United States Steel Corp.*, H.R. Rep. No. 1127, 62d Cong., 2d Sess. 209 (1912) ("Stanley Report"); *Concentration of Control of Money and Credit*, H.R. Rep. No. 1593, 62d Cong., 3d Sess. 138–42 (1913) ("Pujo Report"). The Pujo Report focused on the practice involved in this proceeding:

> As the first and foremost step in applying a remedy, and also for reasons that seem to us conclusive, independently of that consideration, *we recommend that interlocking directorates in potentially competing financial institutions be abolished and prohibited*, so far as lies in the power of Congress to bring about that result . . . .[13] *Id.* at 140 (emphasis added).

That Congress, in enacting Section 8, intended to outlaw interlocks between substantial competitors is unmistakable. The House and Senate reports on the Clayton Act both elaborated on the need for such legislation:

> The importance of the legislation embodied in section [8] of this bill can not be overestimated. The concentration of wealth, money, and property [11] in the United States under the control and in the hands of a few individuals or great corporations has grown to such an enormous extent that unless checked it will ultimately threaten the perpetuity of our institutions. The idea that there are only a few men in any of our great corporations and industries who are capable of handling the affairs of the same is contrary to the spirit of our institutions. From an economic point of view, it is not possible that one individual, however capable, acting as a director in fifty corporations, can render as efficient and valuable service in directing the affairs of the several corporations under his control as can fifty capable men acting as single directors and devoting their entire time to directing the affairs of one of such corporations. The truth is that the only real service the same director in a great number of corporations renders is in maintaining uniform policies throughout the entire system for which he acts, which usually results to the advantage of the greater corporations and to the disadvantage of the smaller corporations which he dominates by reason of his prestige as a director and to the detriment of the public generally.
>
> As the president has well said in his message, the adoption of the provisions of this section will bring new men, new energies, new spirit of initiative, and new blood into the management of our business enterprises. It will open the field of industrial development and origination to scores of men who have been obliged to serve when their abilities entitled them to direct. It will immensely hearten the young men coming on and will greatly enrich the business activities of the whole country. S. Rep. No. 698, 63d Cong., 2d Sess. 16 (1914); H.R. Rep. No. 627, 63d Cong., 2d Sess. 19–20 (1914).

[13] The Pujo Committee would have permitted a national bank director to serve as a director of one trust company "because of the different character of business that may be transacted by the latter." *Id.*

[12] Judge Weinfeld has aptly described the origins of Section 8 and the policy which underlies the statute:

> Congress had been aroused by the concentration of control by a few individuals or groups over many gigantic corporations which in the normal course of events should have been in active and unrestrained competition. Instead, and because of such control, the healthy competition of the free enterprise system had been stifled or eliminated. Interlocking directorships on rival corporations had been the instrumentality of defeating the purpose of the antitrust laws. They had tended to suppress competition or to foster joint action against third party competitors. The continued potential threat to the competitive system resulting from these conflicting directorships was the evil aimed at. Viewed against this background, a fair reading of the legislative debates leaves little room for doubt that, in its efforts to strengthen the antitrust laws, what Congress intended by §8 was to nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates. The legislation was essentially preventative. *United States* v. *Sears, Roebuck & Co.*, 111 F. Supp. 614, 616 (S.D.N.Y. 1953) (footnotes omitted).

It is also clear that Congress contemplated interlocks among the practices comprehended by Section 5 of the FTC Act. Throughout the debate over the Trade Commission bill there was a split between those who would enumerate a set of forbidden practices, and those who would enact a flexible general prohibition and leave to the expert judgment of the Commission the definition of the practices to be held unlawful. The latter view prevailed; however, the Congressional committee reports shed light on the types of practices Congress considered to be "unfair methods of competition" when it established the FTC. The Senate committee wrote: [13]

> The Committee was of the opinion that it would be better to put in a general provision condemning unfair competition than to attempt to define the numerous unfair practices such as local price cutting, *interlocking directorates*, and holding companies intended to restrain substantial competition. S. Rep. No. 597, 63d Cong., 2d Sess. 13 (1914) (emphasis added).

These authorities leave no doubt that director interlocks between competitors are the evil at which Section 8 of the Clayton Act is directed. Section 5 of the FTC Act incorporates that policy. This conclusion is buttressed by the evidence that interlocking directorates were among the practices Congress specifically intended Section 5 to reach.

Perpetual vigorously contends that its interlocks do not violate the policy of Section 8 because Section 8 expressly permits such interlocks. Moreover, respondent argues that to apply Section 5 to the instant interlock would upset "specific" (RAB 15), "carefully selective" (RRB 4) Congressional policies regarding interlocks. However, we find no support for the assertion that these "carefully

selective" policies, if such they be, are intended to permit Perpetual's interlocks. What emerges from the mosaic of federal anti-interlock statutes, foremost among which is Section 8, is a clear antipathy toward interlocking directorates. An examination of these statutes, summarized in respondent's brief (RRB App. A), reveals a general prohibition against horizontal interlocks except to the extent expressly permitted by statute or expressly made subject to federal regulation.

It is true that Congress "compartmentalized" Section 8, in creating separate prohibitions for bank/bank interlocks, vertical interlocks involving common carriers, and horizontal interlocks between industrial corporations. *See, e.g.,* S. Rep. No. 698, 63d Cong., 2d Sess. 14 (1914). However, we find no evidence that Congress considered and evaluated various types of interlocks, condemning some, authorizing others, and that the type of horizontal interlock [14] involved in this case was one which Congress intended to be lawful under Section 8 and outside the scope of Section 5.[14]

The only reported case considering the legality under Section 8 of bank/non-bank interlocks, *United States* v. *Crocker National Corp.,* 422 F. Supp. 686 (N.D. Cal. 1976), *appeal and cross-appeal pending,* Nos. 76–3614 and 76–3615 (9th Cir.), held that interlocks between banks and insurance companies which allegedly competed in certain lending activities did not violate Section 8. Of course, the court intimated no opinion as to the legality of such interlocks under Section 5. *Id.* at 703 n.23. Nowhere in the *Crocker* opinion, nor in any of the authorities cited by respondent or *amici curiae,* is there any indication that Congress carefully considered interlocks between banks and [15] *competing* non-banks, and made a conscious decision to immunize such arrangements while generally condemning other horizontal interlocks.[15]

[14] Respondent and the *amici* have cited several authorities, including subsequent amendments to Section 8, remarks in Congressional debates, unsuccessful legislation in subsequent Congresses, committee staff reports in subsequent Congresses, and a 1950 report of this Commission, for the proposition that bank/non-bank interlocks are not prohibited by Section 8. Insofar as such authorities purport to interpret the intent of Congress they are not entitled to great weight. *See, e.g., United States* v. *Philadelphia National Bank,* 374 U.S. 321, 348–49 (1963). Similarly, the remarks in debate of individual legislators are not always reliable indicators of what Congress intended. *Schwegmann Bros.* v. *Calvert Distillers Corp.,* 341 U.S. 384, 395–96 (1951) (Jackson, J., *concurring*); *United States* v. *Sears, Roebuck & Co.,* 111 F. Supp. 614, 619 (S.D.N.Y. 1953). But, more importantly, none of these authorities compel the conclusion that Perpetual's interlocks do not violate *Section 5.* If it were shown that Congress considered bank/non-bank interlocks and declared them to be an exception to the policy against horizontal interlocks, that might be sufficient to demonstrate that these interlocks fall beyond the reach of Section 5. However, neither respondent nor the *amici* have pointed to any such authority, and we have found none.

[15] Nor do we ascribe any significance to the brief existence of Section 8A of the Clayton Act, which was added by the Banking Act of 1933, ch. 89, §§32, 33, 48 Stat. 194-95, and then repealed by the Banking Act of 1935, ch. 614, §329, 48 Stat. 717-18. Section 8A prohibited director, officer or employee interlocks between banks and corporations (other than mutual savings banks) which made loans "secured by stock or bond collateral." Although Perpetual contends that the enactment and repeal of Section 8A lead to the conclusion that Congress recognized that the original Section 8 never reached bank/non-bank interlocks, that it enacted Section 8A to bridge that statutory gap, and that the repeal of Section 8A restored the prior situation, again legalizing such interlocks, these conclusions

(Continued)

In view of the strong evidence that interlocks between competitors such as those herein contravene the policy of Section 8,[16] and in the absence of [16] a clear Congressional intention to permit such interlocks, we hold that Perpetual's interlocks violate Section 5.[17]

Perpetual also argues that the ALJ erred in holding its interlocks unlawful in the absence of a showing of actual or probable injury to competition or consumers. However, Section 8 of the Clayton Act is a *per se* statute; by its terms it declares certain interlocks unlawful irrespective of any showing of competitive effect, because of their inherent anticompetitive tendencies. *Protectoseal Co.* v. *Barancik*, 484 F.2d 585 (7th Cir. 1973). Where Section 5 is employed to adopt the policy of a *per se* statute, the *per se* standard remains applicable. *Grand Union Co.* v. *FTC*, 300 F.2d 92 (2d Cir. 1962). Congress had ample empirical evidence of the dangerous effects of horizontal interlocks on competition when it enacted Section 8 and Section 5. Accordingly, we hold that evidence of an adverse effect on competition is not necessary to find a violation of Section 5 in this case.[18] [17]

JURISDICTION OF THE FEDERAL TRADE COMMISSION

Perpetual urges that we are barred from acting against its interlocks because the Federal Home Loan Bank Board ("FHLBB" or "Board") has either exclusive or primary jurisdiction over the practice. However, the ALJ found that our jurisdiction is not ousted under either theory advanced by respondent, and we agree.

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are unwarranted. The enactment and repeal of Section 8A took place against the backdrop of Congressional concern about the diversion of bank funds into speculative securities, reasons wholly removed from the competitive concerns embodied in the policy of Section 8. Since neither the passage nor the repeal of Section 8A expressed any Congressional intent to authorize the type of interlocks presented in this case, they do not affect our holding that such interlocks violate Section 5.

[16] Our view as to the undesirability of interlocks between institutions which compete for the funds of the public are concurred in by Chairman Burns of the Federal Reserve Board. Letter from Arthur F. Burns to Hon. William Proxmire, Sept. 28, 1976, Exhibit H to Respondent's Memorandum in Support of Cross-Motion for Summary Decision and in Opposition to Complaint Counsel's Motion for Summary Decision.

[17] In view of our holding that Perpetual's interlocks violate Section 5 because they violate the policy of Section 8 of the Clayton Act, we find it unnecessary to reach the alternative ground for the ALJ's Initial Decision, that such interlocks constitute incipient violations of Section 1 of the Sherman Act. Similarly, we do not address complaint counsel's additional contention that these interlocks constitute unreasonable restraints of the competitive process, applying the rationale of *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233 (1972). We intimate no views as to the applicability of either of these legal theories to the practice involved in this case.

[18] This case does not present the question of whether an exception to the *per se* rule might obtain in circumstances where, but for the director interlocks, an S&L (or bank) would be unable to commence or continue its operations. We note that the Federal Reserve Board has created an exception from Section 8 for certain banks in low income areas. 12 C.F.R. 212.3(g), 212.103 (1977). *Cf. United States* v. *Jerrold Electronics Corp.*, 187 F.Supp. 545, 557 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

Unlike banks, savings and loan associations are not excepted from the jurisdiction of the FTC.[19] Moreover, while federally-insured savings and loan associations are extensively regulated by the FHLBB, nowhere in the regulatory statutes is there an express exemption from the antitrust laws[20] for interlocking directorates involving savings and loan associations.[21] Therefore, if the FTC is to be ousted from jurisdiction over Perpetual's interlocks, it must be under the doctrine of "implied immunity."

It is axiomatic that "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 350-51 (1963). *See also Cantor* v. *Detroit Edison Co.,* 428 U.S. 579, 597 (1976); *Gordon* v. *New York Stock Exchange,* 422 U.S. 659, 682 (1975); *United States* v. *National Association of Securities Dealers,* 422 U.S. 694, 719-20 (1975); *Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 372 (1973); *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 357 (1963). Moreover, the Supreme Court [18] "has consistently refused to find that regulation gave rise to an implied antitrust exemption without first determining that exemption was necessary in order to make the regulatory Act work, 'and even then only to the minimum extent necessary.'" *Cantor* v. *Detroit Edison Co., supra,* at 597 (quoting *Silver* v. *New York Stock Exchange, supra,* at 357). An examination of the statutory scheme for the regulation of savings and loan associations reveals no legislative intention to displace the operation of the antitrust laws nor a "plain repugnancy" between the antitrust and regulatory schemes, nor does it suggest that an antitrust exemption is necessary to make the regulatory scheme work.

The Home Owners' Loan Act (HOLA), enacted in 1933, empowered the FHLBB to charter and supervise federal savings and loan associations. The Board is authorized to prescribe rules and regulations providing for the "organization, incorporation, examination, operation, and regulation" of federal savings and loan associations. 12 U.S.C. 1464(a). In addition the HOLA gives the Board authority to regulate S&L mergers, and the chartering of new

[19] Perpetual is a "corporation" within the meaning of Section 4 of the FTC Act, 15 U.S.C. 44, and is not a "bank" within the meaning of Section 5(a)(2) of the FTC Act, 15 U.S.C. 45(a)(2) (ID 1). When the FHLBB was created in 1933, Congress did not amend the FTC Act to exempt S&L's, as it did in 1938, upon the creation of the Civil Aeronautics Board, to exempt air carriers.

[20] The FTC Act when applied to unfair methods of competition is certainly an "antitrust law" in its substantive effect.

[21] Compare, *e.g.,* 49 U.S.C. 1379(a), authorizing the Civil Aeronautics Board to permit interlocking directorates among carriers subject to its jurisdiction, and 49 U.S.C. 1384, the concomitant statute affording antitrust immunity for transactions approved by the CAB.

S&L's. 12 U.S.C. 1464(d)(11), (e). Under 12 U.S.C. 1464(d), the Board is empowered to enforce the HOLA and to bring proceedings concerning

> (1) violations of "a law, rule, regulation, or charter or other condition imposed in writing by the Board in connection with the granting of any application or other request by the association, or written agreement entered into with the Board" (12 U.S.C. 1464(d)(2)(A));
>
> (2) "unsafe and unsound practices" engaged in by S&L's (*id.*); or
>
> (3) acts by officers or directors of S&L's which amount to violations of law, rule, regulation or a cease and desist order, or unsafe or unsound practices, or other acts, omissions, or practices which constitute a breach of fiduciary duty where the Board determines [19]
>
> "that the association has suffered or will probably suffer substantial financial loss or other damage or that the interests of its savings account holders could be seriously prejudiced," and that the violation, practice or breach of duty involves personal dishonesty (12 U.S.C. 1464 (d)(4)(A)).

If one of the above violations is found, the Board may issue a cease and desist order, seek a court injunction, and, in the case of violations by directors or officers, it may order their removal from office.[22] 12 U.S.C. 1464(d)(2)–(4).

In enacting the HOLA Congress was concerned with the maintenance and growth of a safe and sound local thrift industry to provide for the financing of homes. 12 U.S.C. 1464(a) recites:

> In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized. . .to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as "Federal Savings and Loan Associations", and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States.

There is no provision in the HOLA containing any specific directive relating to interlocking directorates.[23] A review of both the statutory

[22] Under specified conditions, the Board may appoint conservators or receivers for S&L's. 12 U.S.C. 1464(d)(6).

[23] *Cf.* the National Housing Act, 12 U.S.C. 1730a(i), which expressly prohibits officers or directors of savings and loan holding companies from serving simultaneously as officers, directors or employees of federally-insured S&L's or other savings and loan holding companies without prior approval of the Federal Savings & Loan Insurance Corporation. Even under the National Housing Act, there is a saving clause declaring that nothing contained therein (other than approved mergers) shall constitute a defense to a violation of the antitrust laws. 12 U.S.C. 1730a(l).

language and the legislative history of the FHLBB regulatory scheme reveals no [20] indication that Congress intended to preempt the anti-trust laws (and the FTC Act) with regard to interlocking directorates involving S&L's, nor any suggestion that the two schemes are incompatible.

In addition to the assertedly pervasive nature of S&L regulation, respondent and the *amici* place primary reliance on a single phrase in 12 U.S.C. 1464(d)(1). That section reads, in pertinent part:

> *The Board shall have power to enforce this section and rules and regulations made hereunder. In the enforcement of* any provision of this section or rules and regulations made hereunder, *or any other law or regulation,* or in any other action, suit, or proceeding to which it is a party or in which it is interested, and in the administration of conservatorships and receiverships, *the Board is authorized to act in its own name and through its own attorneys* (emphasis added).

Perpetual urges that the language "or any other law" empowers the Board to enforce virtually any law which, if violated, would affect the operation of a savings and loan association (RAB 31). While this language could be interpreted as giving the Board a broad mandate to regulate the affairs of S&L's, it does not support the conclusion that the FHLBB has exclusive authority to regulate S&L interlocks.[24] Congress' intent to create such exclusive authority and to carve out an exception to the FTC's jurisdiction would have to be much clearer for us to reach such a conclusion.[25]

[21] *Reich* v. *Webb,* 336 F.2d 153 (9th Cir. 1964), *cert. denied,* 380 U.S. 915 (1965), properly gave the phrase "or any other law" a broad reading in order to extend to the Board the power to enforce common law fiduciary duties of S&L directors and officers. 336 F.2d at 158. There the court found that to do so was consistent with the Congressional purpose to guard against unsafe and unsound practices. Here, we find in Section 1464(d)(1) no Congressional intent to override the antitrust laws, and thus no implied authority on the part of the Board to permit Perpetual's interlocks if such interlocks violate Section 5 of the FTC Act.[26]

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[24] Indeed, to accept respondent's argument would be to grant the FHLBB exclusive power to enforce the entire United States Code with respect to savings and loan associations. It is doubtful that Congress intended such a result.

[25] Once again, the example of the Federal Aviation Act is instructive. When Congress wanted to exempt air carriers from the FTC's jurisdiction it did so explicitly in Section 5(a)(2) of the FTC Act, and 49 U.S.C. 1381 authorizes the Civil Aeronautics Board to order air carriers to cease and desist from "unfair or deceptive practices or unfair methods of competition." No similar statutory provisions exist with respect to S&L's.

[26] Similarly, the cases cited by respondent referring to the Board's "cradle to grave" regulation of S&L's are inapposite since all deal with the question of federal preemption vis-a-vis *state* regulation, rather than the reconciliation of two *federal* statutory schemes. *See, e.g., Meyers* v. *Beverly Hills Federal Savings & Loan Ass'n,* 499 F.2d 1145 (9th Cir. 1974); *Smith* v. *Jaques,* Civil 75-939, (D. Ore. Dec. 1, 1976); *Rettig* v. *Arlington Heights Federal Savings & Loan Ass'n,* 405 F. Supp. 819 (N.D. Ill. 1975); *People* v. *Coast Federal Savings & Loan Ass'n,* 98 F.Supp. 311 (S.D. Cal. 1951).

[22] Those courts which have considered the question whether the S&L regulatory scheme displaces federal antitrust law have uniformly held that it does not. *Central Savings & Loan Association* v. *Federal Home Loan Bank Board,* 422 F.2d 504, 509 (8th Cir. 1970); *Wolfson* v. *Artisans Savings Bank,* 428 F. Supp. 1315, 1323 (D. Del. 1977); *Kinee* v. *Abraham Lincoln Federal Savings & Loan Association,* 365 F.Supp. 975, 981–82 (E.D. Pa. 1973). The *Wolfson* and *Kinee* cases both involved alleged conspiracies among mortgage lenders to require the prepayment by mortgagors of insurance, taxes, and other charges, and to refuse to pay interest on such funds while held in escrow. S&L defendants in each case claimed that FHLBB regulations permitted the practice of not paying interest on these escrow funds, and that therefore the antitrust laws were impliedly repealed with respect to such practices. The *Wolfson* court held:

> Home Federal has not shown any clear repugnancy between the antitrust laws and the system of FHLBB regulation implicated in this lawsuit. It appears that the FHLBB regulatory scheme for federal savings and loan associations does not concern itself at all with attempting to affect, either positively or negatively, the competitive conditions in the banking field. Indeed, subjecting member associations to the antitrust laws may further the object of the Home Owners' Loan Act of providing for the sound and economical financing of homes by encouraging federal savings and loan associations to vie energetically with other financial institutions for home mortgage business. The mere fact that the FHLBB permits some of the challenged practices does not make those practices a matter of federal policy. I find no implied repeal of the Sherman and Clayton Acts in the context of this case. 428 F.Supp. at 1322–23.

Had the FHLBB *required* S&L's not to pay interest, a "clear repugnancy" may have been found. Similarly, while here the Board's recently promulgated guidelines recommend that S&L's have no more than two directors who are also bank directors (and hence impliedly permit such interlocks), they do not *require* that [23] S&L's have two bank directors on their boards, nor that such bank directors be directors of *competing* banks.[27] Thus, there is no "plain repugnancy" between the two statutes; the goals of each can be harmonized.

This is the teaching of *Silver* v. *New York Stock Exchange, supra,* where the Court held that "the proper approach . . . is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted." 373 U.S. at 357. Thus, in cases where Congress, in enacting a regulatory statute, either was aware of a practice which otherwise would violate the antitrust laws and expressly authorized a regulatory agency to supervise the practice, or created a regulatory scheme which, as to

[27] In addition, for established S&L's such as Perpetual, it does not appear that the Board's guidelines have any more than advisory effect. *See* note 9, *supra.*

certain practices, was inherently inconsistent with antitrust principles, implied repeal has been held necessary to make the regulatory act work. *Gordon* v. *New York Stock Exchange, supra; United States* v. *National Association of Securities Dealers, supra; Pan American World Airways* v. *United States,* 371 U.S. 296 (1963). On the other hand, where the two can be reconciled, the antitrust laws have been given full force and effect. *Otter Tail Power Co.* v. *United States, supra; Silver* v. *New York Stock Exchange, supra.*

The key inquiry to be made is whether implied immunity is necessary to make the S&L regulatory scheme work. There is no indication that subjecting S&L's to Section 5 to the extent that it bars interlocking directorates with competing banks will interfere with the Board's supervision over S&L's, or subject Perpetual to inconsistent regulation. There being no showing here that Congress intended interlocking directorates of savings and loan associations to be exempt from the antitrust laws, nor that such an exemption is necessary to make the HOLA work, we hold that the FTC has jurisdiction to declare S&L/bank interlocks unfair methods of competition in violation of Section 5.

Alternatively, Perpetual argues that even if the FHLBB's jurisdiction over its interlocks is not exclusive, the doctrine of primary jurisdiction requires [24] us to defer to the Board's expertise in considering this issue.[28] Unlike the doctrine of implied immunity, discussed *supra,* invocation of primary jurisdiction would simply require a *postponement,* rather than an ouster of FTC jurisdiction. *See, e.g., United States* v. *Philadelphia National Bank,* 374 U.S. 321, 353–54 (1963). Since the FHLBB has already had the opportunity to issue guidelines on the question of S&L/bank interlocks, and provide the Commission with guidance as to its interpretation of the HOLA in this regard, there is no longer any need to defer consideration of the antitrust issues.

Moreover, this is not a case where the HOLA or any of its provisions are incompatible with the maintenance of an antitrust action, *supra,* nor one in which the Board's action would be of "material aid" to the Commission in determining whether bank/S&L interlocks are unfair methods of competition. *Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. 289, 302 (1973). Nor would the tests of *Nader* v. *Allegheny Airlines, Inc.,* 426 U.S. 290, 303–06

[28] The doctrine of primary jurisdiction is concerned with "whether the court should refrain from exercising its jurisdiction until after an administrative agency has determined some question or some aspect of some question arising in the proceeding before the court." Davis, *Administrative Law Text* 373 (3d ed. 1972). It is far from clear that primary jurisdiction, or the policies underlying the doctrine, apply between agencies in circumstances such as are presented in this case. However, for purposes of analysis, we assume, *arguendo,* the applicability of the doctrine.

(1976), require us to defer further to the Board. It would not be necessary to secure uniformity or consistency in the regulated industry, since there is no necessary inconsistency between Section 5 and the FHLBB statutes and guidelines, there are no factual questions uniquely within the Board's expertise, and the "reasonableness" of the interlocks is not in issue.

THE ALJ'S ORDER

Judge Timony's order would require Perpetual to cease and desist from having any director or officer who either:

(a) is or would be at the same time a director or officer of Perpetual, and who is a director, officer, or affiliated person of a director or officer of American Security [25] and Trust Company ("American Security"), National Bank of Washington ("National Bank"), Union First National Bank of Washington ("Union First") or any other organization engaged in the provision of financial services, so long as Perpetual and either American Security, National Bank, Union First or such other business organization are in competition; or

(b) fails to submit to Perpetual any statement required by Paragraph IV of this order.

The Commission has wide latitude in fashioning a remedy, subject to the constraint that the remedy chosen must have a reasonable relation to the unlawful practices found to exist. *E.g., FTC* v. *Colgate-Palmolive Co.* 380 U.S. 374, 394–95 (1965); *FTC* v. *National Lead Co.*, 352 U.S. 419, 429 (1957); *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952); *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 613 (1946). We reject respondent's argument that any order should be limited to prohibit only director interlocks between Perpetual and commercial banks with which it allegedly competes in the solicitation of savings deposits and the financing of residential loans. The order properly can prohibit interlocks between Perpetual and competing institutions offering services and products other than simply those involved in the specific interlocks found herein. *FTC* v. *Colgate-Palmolive Co., supra.* The scope of the order is consistent with that issued in prior interlock cases, *e.g., Kraftco Corp.*, 89 F.T.C. 46 (1977). Having violated the law, respondent "must expect some fencing in." *FTC* v. *National Lead Co., supra,* at 431.

However, we feel that some portions of Judge Timony's order can be more narrowly tailored. Specifically, we do not find it necessary under the facts of this case to prohibit officer interlocks, nor is the extension of the ban to "affiliated persons," who are defined as close relatives of an officer or director sharing a home or business address with such person, necessary to effective relief in this case.

Thus, our order bars a person from serving simultaneously as a director of Perpetual and a director of any other corporation, so long as such corporation is engaged in the provision of any financial service[29] in competition with Perpetual.

[26] We do not consider the requirement in the order that Perpetual obtain from directors or nominees for the board a list of products and services produced and sold by other businesses on whose boards they serve to be unduly burdensome. Rather, it sets up a convenient method by which Perpetual can ensure its own compliance with the order. *Kraftco Corp., supra,* at 66–67. However, as in *Kraftco,* we will impose this requirement only for a period of five years; thereafter, Perpetual will be responsible for establishing its own means of ensuring compliance with the order and with Section 5.[30]

PREJUDGMENT

Respondent's allegation that the Commission prejudged the issues in this case through its issuance of a Statement of Policy, 41 F.R. 35573 (1976), during the pendency of this proceeding, is rejected. The Statement of Policy (a) describes the *Perpetual* complaint; (b) states that the Commission, in issuing the Statement, "has made no determination on the merits that Perpetual or any other person or corporation has actually violated the law . . ."; (c) notes the Commission's usual practice of naming individual directors in interlock complaints (from which it departed in the *Perpetual* complaint); (d) states that "[w]hile the reach of Section 8 of the Clayton Act to interlocks between banks and other corporations such as savings and loans may not be clear, no similar express statutory provision is contained in Section 5 of the FTC Act," a truism; and (e) warns that after January 1, 1977, individual S&L directors will be named as respondents in complaints "which may from time to time issue challenging allegedly unlawful interlocks of this nature . . . ." No "disinterested reader," *Texaco Inc.* v. *FTC,* 336 F.2d 754, 760 (D.C. Cir. 1964), *rev'd per curiam on other grounds,* 381 U.S. 739 (1965), of this Statement of Policy could reasonably conclude that the Commission had therein prejudged the issues in this case. [27]

CONCLUSION

The concern which Congress felt in 1914, when it enacted the FTC

[29] We have also amended the definition of "financial services" in Judge Timony's order to include only the services provided now or in the future by Perpetual.

[30] The ALJ's order has also been modified in a number of respects for purposes of clarification and to eliminate certain redundancies.

and Clayton Acts, with concentration of wealth and power in the hands of a few remains a central one. It is particularly pressing in the sensitive financial sector of our economy. Interlocking directorates among competitors by their very nature create the potential for anticompetitive conduct, and thus have long been condemned by the law. To permit interlocking directorates among financial institutions who compete for the funds of the public, and in the making of loans in our credit-dominated society, would be to create potential conflicts of interest which could have seriously adverse effects on competition. In such circumstances, it is clear that Perpetual's interlocks with competing commercial banks constitute unfair methods of competition condemned by Section 5 of the FTC Act.

Except for the modifications of Judge Timony's order indicated above, the initial decision is affirmed, with such additional findings of fact and conclusions of law as may be contained herein.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of respondent from the initial decision, and upon briefs and oral argument in support thereof and opposition thereto, and the Commission, for the reasons stated in the accompanying opinion, having determined to sustain the initial decision with certain modifications:

It is ordered, That the initial decision of the administrative law judge, pages 1–49, be adopted as the Findings of Fact and Conclusions of Law of the Commission, except to the extent indicated in the accompanying opinion.

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying opinion.

It is further ordered, That the following order to cease and desist be, and it hereby is, entered:

I

It is ordered, That the following definitions shall apply in this order:

[2] (a) "Director" includes voting members of boards of directors, non-voting members of boards of directors, advisory directors, and directors emeriti.

(b) "Financial services" means any financial service presently or hereafter offered by Perpetual including, but not limited to solicitation and maintenance of demand, savings or time deposits or

accounts; residential loans; other mortgage loans; any other type of loans; retirement accounts; or direct deposit services.

(c) "Parent" of a corporation means any other corporation which owns or controls 50 percent or more of the voting stock of such corporation.

(d) "Residential loans" are loans secured by mortgages or other liens on non-farm property containing 1–4 dwelling units.

(e) "Savings" includes all savings accounts, savings deposits, passbook savings accounts, and savings deposit accounts offered by any business organization.

(f) "Sister" corporations are corporations sharing a common parent.

(g) "Subsidiary" of a corporation is any corporation of which the subject corporation is a parent.

(h) "Time deposits" are all deposits, including certificates of deposits, that are not demand deposits or savings.

II

It is further ordered, That for purposes of this order, a corporation, including Perpetual Federal Savings and Loan Association ("Perpetual") and any corporation which shares a common director with Perpetual, shall be deemed to be engaged in the provision of a financial service, if any parent, subsidiary, or sister of such corporation is so engaged. [3]

III

It is further ordered, That upon this order's becoming final respondent Perpetual, its successors and assigns, do forthwith cease and desist from having, and in the future shall not have any individual serve as a director who either:

(a) is or would be at the same time a director of Perpetual and a director of American Security and Trust Company ("American Security"), National Bank of Washington ("National Bank"), Union First National Bank of Washington ("Union First") or any other corporation, so long as such corporation is engaged in the provision of any financial service in competition with Perpetual;

(b) fails to submit to Perpetual any statement required by Paragraph IV of this order.

IV

It is further ordered, That within thirty (30) days of the date of service of this order and prior to each election of directors or to the

solicitation of proxies for such election, whichever is earlier, hereafter, Perpetual shall obtain a written statement from each member of its board of directors (except directors whose terms expire at the next election and who are not standing for re-election) and from each nominee for a directorship (who is not then a director) showing:

(a) the name and home mailing address of each director or nominee; and

(b) the name and principal office mailing address of, and a description of each product or service produced or sold by, each corporation in which each such person then serves as a director or has been nominated as a director.

The requirements of this Paragraph shall not apply to elections of directors occurring after five (5) years from the effective date of this order.

Nothing in this paragraph shall be construed to relieve respondent of its obligation under Paragraph III(a) hereof.

V

It is further ordered, That within forty-five (45) days of the date of service of this order and annually for a period of ten (10) years thereafter, Perpetual shall file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order. Copies of the statements obtained pursuant to Paragraph IV of this order shall be submitted to the Commission as part of the reports of compliance required by this paragraph during the first five (5) years. Expiration of the obligations imposed by this paragraph shall not excuse Perpetual's obligation to comply with Paragraph III of this order.

VI

It is further ordered, That the provisions of Paragraphs III through V hereof shall not apply where the interlocked corporation is Perpetual's (1) parent, (2) sister, or (3) subsidiary.

VII

It is further ordered, That Perpetual shall give the Commission at least thirty (30) days prior notice of any change in the corporation such as dissolution, assignment, or sale resulting in the emergence of

a successor corporation, the creation or dissolution of a parent, sister or subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

Commissioner Collier dissenting.

IN THE MATTER OF

BENEFICIAL CORPORATION, ET AL.

Docket 8922. Interlocutory Order, Dec. 20, 1977

Order rejecting proposed form of order submitted by respondents and directing the submission, by both parties, of a new form of order within sixty days. If no joint proposal is submitted, parties are directed to submit, within sixty days, briefs fully addressing the issues raised in the Commission's order of July 15, 1977.

In response to our order of July 15, 1977, calling for briefs directed to issues presented by the order of the United States Court of Appeals for the Third Circuit remanding this matter, respondents have submitted a proposed order and sample advertisement which is not opposed by complaint counsel. We have examined the proposed order and sample advertisement and find them deficient in several respects. First, only a proposed print advertisement has been submitted with the proffered order as an example of what the order would permit, although the record establishes that respondents use radio and television advertising extensively. It is not at all clear how the parties believe the order would apply to such advertising.

Moreover, our review of the proposed advertisement does not convince us that the deception that we earlier found in respondents' use of the "instant tax refund" slogan would be cured. The proposed advertisement still suggests that there is *some* relationship (even if not a dependency) between the loan and the amount of the expected refund. In fact, as we have previously held, and the court of appeals has affirmed, the eligibility for, or amount of, any income tax refund is entirely unrelated to an applicant's eligibility for, or the amounts of, any loan.

Under the circumstances, we believe that the best course is to conduct further proceedings.

It is ordered, That the parties submit, within 60 days, such other order (if any) as they may jointly propose. Any such proposed order shall be accompanied by proposed advertisements for the media customarily used by respondents and by a detailed proposed protocol for objective consumer perception surveys of those and other representative advertisements. The proposed protocol should be designed to test whether the proposed advertisements cure the deception which we previously found in respondents' use of the "instant tax refund" slogan.

It is further ordered, That if the parties do not submit such a joint

proposal, they submit within 60 days briefs as required by our order of July 15, 1977, fully addressing the issues raised in that order.

IN THE MATTER OF

JIM WALTER CORPORATION

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SECTION 7 OF THE CLAYTON ACT

Docket 8986. Complaint, July 29, 1974 — Final Order, Dec. 20, 1977

This order, among other things, requires a Tampa, Fla. manufacturer of shell housing and construction material to divest itself within one year of all interests in the Philip Carey Company and Carey-Canadian Mines, Ltd., divisions of Panacon Corporation; and prohibits the firm from acquiring for a period of ten years, any interest in a manufacturer, seller, or distributor of asphalt or tar roofing products without prior Commission approval.

Appearances

For the Commission: *Joseph J. O'Malley, Peter W. Kitson, Harold J. Lamboley, Jr.* and *Gilbert E. Geldon.*

For the respondent: *W. Donald McSweeney, William A. Montgomery* and *Susan A. Henderson, Schiff, Hardin & Waite,* Chicago, Illinois.

COMPLAINT

In the exercise of authority vested in it by the Federal Trade Commission Act, the Federal Trade Commission, having reason to believe that respondent, Jim Walter Corporation, a corporation, has violated Section 7 of the Clayton Act (15 U.S.C. 18), and that a proceeding in respect thereof would be in the public interest, issues this complaint charging as follows:

I. DEFINITIONS

For the purpose of construing this complaint the following definitions shall be controlling:

(a) "Asphalt and tar roofing" shall include both built-up roofing and shingles which are made from a dry felt, asbestos, or fiber glass base, saturated or coated with asphalt flux or coal tar pitch.

(b) "Built-up roofing" includes both tar and asphalt multi-layer, flat-topped roofing. This type of roof covering normally consists of from two to four plys of roll roofing sheets "built-up" with alternating coats of asphalt or coal tar pitch. [2]

(c) "Saturated felts" consist of a dry felt base, made from rags, wood, and other cellulose fibers, impregnated with an asphalt or tar saturant.

(d) "Roll roofing" is made from a saturated felt by applying an

additional coating of more viscous, weather-resistant asphalt. Roll roofing serves as the laminations in a built-up roof.

(e) "Asphalt shingles" are mineral-surfaced saturated felts machine-cut into squares of strips.

(f) "Asphalt and tar roofing materials" and "asphalt roofing materials" are used interchangeably herein to refer to saturated felts, roll roofing, and asphalt shingles, but specifically excludes accessory items such as asphalt cements, adhesives, primers, and mineral granules.

II. RESPONDENT

2. Jim Walter Corporation (hereafter "JWC") is a publicly-held corporation chartered and operating under the laws of the State of Florida, with a principal place of business at 1500 North Dale Mabry Highway, Tampa, Florida.

3. In addition to being the leading manufacturer of shell (partially finished) housing, JWC also ranks as a major producer of construction materials. Most of the corporation's activities are conducted through eight operational groups: mineral and fiber products; metal and wood products; stone and concrete products; pipe products; homebuilding supplies; paper; sugar operations; and oil and gas operations. Since its incorporation in 1955, JWC has managed to increase its share of the shell house market by internal expansion, and diversified into homebuilding supplies via acquisitions. In the past ten years alone JWC has [3] acquired no fewer than seventeen separate companies. For its fiscal year ending August 31, 1972, JWC reported revenues of $881,737,000; total assets of $983,217,000; and a net income of $44,568,000. On the basis of these figures, the May 1973 *Fortune 500* issue ranked Jim Walter Corporation as the 161st largest industrial corporation in the United States.

4. On July 12, 1962, JWC revealed the details of its agreement to purchase a 34 percent stock interest in the Celotex Corporation. A principal manufacturer of insulation fiberboard, mineral wool, gypsum, and asphalt roofing materials, Celotex became a fully-owned subsidiary of Jim Walter Corporation by the close of 1964. JWC further expanded its capacity to produce building materials and, in particular, roofing products by acquiring the Barrett Building Materials Division of Allied Chemical Corporation in 1967. The merger of Barrett into JWC's Celotex Division extended "Celotex' capabilities in roofing materials from one plant to eight."

5. At all times relevant to this complaint JWC has sold and shipped, and continues to sell and ship, its products in interstate

commerce throughout the United States. Consequently, JWC was, at the date of the acquisition in question here, and is now, engaged in commerce as "commerce" is defined in the Clayton Act (15 U.S.C. 12).

III. PANACON CORPORATION

6. Prior to April 17, 1972, Panacon Corporation (hereafter "Panacon") was a corporation chartered and operating under the laws of the State of Michigan, with a principal place of business at 320 South Wayne Ave., Cincinnati, Ohio. The Glen Alden Corporation owned 89 percent of the outstanding common stock of Panacon prior to April 1972.

7. At the time of its acquisition, Panacon was a substantial manufacturer of "a wide range of products for residential and commercial construction and industrial applications." Organized in six operating divisions, Panacon produced and marketed such diverse products as vitreous china, porcelain-on-steel plumbing ware, floor tiles, roofing materials, insulations, bathroom cabinets, lighting fixtures, ventilating fans, electric [4] fireplaces, and water heaters. For its fiscal year ending December 31, 1971, Panacon reported revenues of $181,129,000; total assets of $106,008,000; and a net profit of $10,591,000.

8. On April 9, 1970, the Plan and Agreement of Merger executed on December 31, 1969, by the Philip Carey Corporation and Briggs Manufacturing Company was consummated. Under the terms of this agreement Carey was merged into Briggs and Briggs, as the surviving entity, adopted the new name of Panacon Corporation. Each share of the Briggs common stock was exchanged for one share in Panacon; all of the Carey common stock was converted into 4,644,000 shares of common and 7,356,000 shares of Class A common stock in Panacon.

9. At all times relevant to this complaint Panacon sold and shipped products in interstate commerce and was, therefore, engaged in commerce as that term is defined in the Clayton Act (15 U.S.C. 12).

IV. THE ACQUISITION

10. Pursuant to an agreement signed earlier in the month, JWC purchased an 89 percent stock interest in Panacon from Glen Alden Corporation for $62,000,000 on April 17, 1972. On June 29, 1972, the shareholders of Panacon voted to approve the merger of Panacon into the Celotex Division of JWC. Thereafter, JWC completed its

takeover by giving the remaining shareholders cash for their 11 percent interest. The total cost of the acquisition was approximately $73,000,000.

V. TRADE AND COMMERCE

11. Functionally, the production of asphalt and tar roofing materials breaks down into two distinct processes: (1) the preparation of a base (dry felt, asbestos, or fiberglass) mat; and (2) the conversion of this mat into saturated felts, roll roofing, or shingles. The overwhelming proportion of asphalt roofing materials derive from a dry felt base saturated with asphalt flux, coated with mineral granules, and cut into sheets or shingles. [5]

12. Today over 80 percent of all roofing applied in the United States is produced by the asphalt roofing industry. There are approximately . 29 manufacturers of asphalt roofing materials operating a total of 120 plants in the United States.

13. Asphalt roofing materials are manufactured, transported, sold, and applied throughout the United States. For the year (1971) preceding the acquisition in question here total sales of asphalt roofing materials, as defined herein, amounted to $654.7 million, of which $457.9 million represented sales of shingles and $196.8 million was sales of built-up roofing (saturated felts and roll roofing). The eight largest manufacturers of these products reported sales of $539.6 million, or 82.4 percent of all sales; the four largest manufacturers realized $336.3 million in sales, or 51.4 percent of all sales of asphalt roofing materials. These same eight manufacturers operated 92, or 76.7 percent, of all plants producing these materials in the United States.

14. For the year 1971, Jim Walter Corporation ranked fifth in sales of all asphalt roofing materials; third in sales of built-up roofing materials; and seventh in the sale of shingles. JWC represented 8.8 percent, 12.3 percent, and 7.3 percent of all sales of asphalt roofing materials, built-up roofing, and shingles. During the same year Panacon ranked sixth, fifth, and sixth in sales of all asphalt roofing materials, built-up roofing, and shingles, respectively. After this acquisition, Jim Walter Corporation ranked second, first, and second in the sales of all asphalt roofing materials, built-up roofing, and shingles, respectively, with total sales of asphalt roofing materials of $123.5 million.

VI. EFFECTS OF THE ACQUISITION

15. The effect of the acquisition of Panacon by JWC may be

substantially to lessen competition or to tend to create a monopoly in the manufacture, sale, and distribution of all asphalt roofing materials and of built-up roofing and shingles in the United States, as a whole, and in certain states in the following ways: [6]

(a) By eliminating actual competition between JWC and Panacon in the manufacture, sale and distribution of all asphalt roofing materials and built-up roofing and shingles.

(b) The ability of JWC's competitors to compete in the manufacture, sale and distribution of all asphalt roofing materials and built-up roofing and shingles has been, and may be, further substantially diminished.

(c) The probability of JWC's competitors pricing their asphalt roofing products on an independent basis has been, and may be, further substantially impaired as a result of the increased potential for price leadership among manufacturers of asphalt roofing materials.

(d) The entry of new asphalt roofing materials manufacturers may have been, and may be, significantly discouraged or retarded.

(e) The ability of purchasers of asphalt roofing materials, as defined herein, to select from alternative manufacturers has been and may be substantially limited.

(f) The dominant position of JWC in the manufacture, sale and distribution of all asphalt roofing materials and of built-up roofing materials and shingles has been, and may be, further enhanced and solidified vis-a-vis its competitors with the result that any reduction in such dominance will be extremely remote.

VII. VIOLATION

16. The acquisition of Panacon Corporation by Jim Walter Corporation constitutes a violation of Section 7 of the Clayton Act (15 U.S.C. 18).

Initial Decision by Joseph P. Dufresne, Administrative Law Judge

May 6, 1976

Preliminary Statement

In a complaint dated July 29, 1974, the Commission charged Jim Walter Corporation (JWC) with violation of Section 7 of the Clayton Act (15 U.S.C. 18). The gravamen of the charges was that the effect of the purchase by JWC of the stock of Panacon Corporation (Panacon) for approximately $73,000,000 in April 1972 (Complaint, par. 10) may

have been, or be, substantially to lessen competition or to tend to create a monopoly in the manufacture, sale and distribution of all asphalt roofing materials and of built-up roofing and shingles in the United States as a whole and in certain states (Complaint, par. 15). [2]

The complaint definition of asphalt and tar roofing materials includes saturated felts, roll roofing, and asphalt shingles made from a dry felt, asbestos or fiber glass base, saturated or coated with asphalt flux or coal tar pitch, but excludes accessory items such as asphalt cements, primers, and mineral granules (Complaint, par. 1(a), (f)).

It was alleged that adverse effects on competition would come about in the following ways:

(a) By eliminating actual competition between JWC and Panacon in the manufacture, sale and distribution of all asphalt roofing materials and built-up roofing and shingles.

(b) The ability of JWC's competitors to compete in the manufacture, sale and distribution of all asphalt roofing materials and built-up roofing and shingles has been, and may be, further substantially diminished.

(c) The probability of JWC's competitors pricing their asphalt roofing products on an independent basis has been, and may be, further substantially impaired as a result of the increased potential for price leadership among manufacturers of asphalt roofing materials.

(d) The entry of new asphalt roofing materials manufacturers may have been, and may be, significantly discouraged or retarded.

(e) The ability of purchasers of asphalt roofing materials, as defined herein, to select from alternative manufacturers has been and may be substantially limited.

(f) The dominant position of JWC in the manufacture, sale and distribution of all asphalt roofing materials and of built-up roofing materials and shingles has been, and may be, further enhanced and solidified vis-a-vis its competitors with the result that any reduction in such dominance will be extremely remote. (Complaint, par. 15)

[3] In its answer, JWC denied the allegations and denied making the acquisition, but admitted that its wholly-owned subsidiary, The Celotex Corporation (Celotex), had acquired approximately 89 percent of the two classes of common stock of Panacon. The answer also raised the defenses (1) that the acquisition of Panacon by Celotex enhanced competition, (2) that neither asphalt roofing materials, built-up roofing, nor shingles, as referred to in the complaint, is a proper line of commerce under Section 7 of the Clayton Act, and (3) that the entire United States is not a proper section of the country under Section 7 for purposes of this case.

Prehearing conferences were held on October 24, 1974, and January 7, 1975; however, participation by counsel for JWC in other antitrust proceedings involving Celotex interfered with the completion of discovery and the start of the adjudicative hearings. The start of the hearings also was delayed due to the filing of numerous (23)

motions and applications for review having to do with such things as the date for the hearings to begin, discovery, and the protection of competitively sensitive information.

The hearings began on October 28, 1975. Presentation of the case-in-chief was completed on December 1, 1975. A motion for dismissal was orally argued on December 1, 1975 (Tr. 1152–1197), and denied on January 21, 1976. Presentation of the case-in-defense was completed on January 21, 1976. The record was closed for the receipt of evidence on February 11, 1976, but was reopened for the receipt of additional testimony on February 17, 1976. March 12, 1976, was the date by which proposed findings of fact, conclusions and a proposed order were to be filed and March 29, 1976, was the date by which the parties replied to the proposals and briefs of the other side.

The findings of fact below are based on a review of the complaint, respondent's answer, stipulations, testimony and exhibits, and consideration of the demeanor of the witnesses at the hearings. In addition, the proposed findings of fact, conclusions and order, together with reasons and briefs in support thereof filed by both sides have been given careful consideration. To the extent not adopted in this decision in the form proposed or in substance, they are rejected as not supported by the record or as immaterial. [4]

The findings of fact include references to supporting evidentiary items in the record. Such references are intended to serve as guides to the testimony, evidence and exhibits supporting the findings of fact. They do not represent complete summaries of the evidence considered in arriving at such findings. The following abbreviations have been used:

CX – Commission's Exhibit, followed by number of exhibit being referenced.

RX – Respondent's Exhibit, followed by number of exhibit being referenced.

Tr. – Transcript, preceded by the name of the witness, followed by the page number.

Admissions – Respondent's response to Complaint Counsel's Request for Admissions filed May 16, 1975.

FINDINGS OF FACT

I. RESPONDENT JIM WALTER CORPORATION

A. Jim Walter Corporation

1. The Jim Walter Corporation (JWC) is a publicly held corporation organized and existing under the laws of the State of Florida, with its principal place of business at 1500 North Dale Mabry Highway, Tampa, Florida (Complaint and Answer, par. 2). It was incorporated in 1955 (Complaint and Answer, par. 3).

2. JWC is one of the nation's largest building and construction materials companies (CX 28, at 22; CX 29U; CX 31B). Prior to December 31, 1969, JWC was engaged in the sale, construction and financing of shell-type homes. As of January 1, 1970, JWC home building activities were transferred to its wholly-owned subsidiary, Jim Walter Homes, Inc. (Admissions, pars. 6, 9). [5]

3. JWC conducts its business through a large number of subsidiary corporations which are organized into operating groups (Complaint and Answer, par. 3; *see* CX 8B). In 1972, these groups included mineral and fiber products; pipe products; home building; metal and wood products; stone and concrete products; paper; sugar; savings and loan operations; and oil and gas operations (CX 29L–T).

4. JWC and its subsidiaries had approximately 26,400 employees on August 31, 1974 (CX 37E).

5. As of August 31, 1972, JWC owned all of the outstanding voting securities of the following corporations:

Jim Walter Homes, Inc.
Dixie Building Supplies, Inc.
J.W. Walter, Inc.
Best Insurors, Inc.
Mid-State Homes, Inc.
Coast to Coast Advertising, Inc.
Jim Walter Advisers, Inc.
The Celotex Corporation
First Brentwood Corporation
The South Coast Corporation
Knight Paper Company
The Georgia Marble Company
United States Pipe and Foundry Company
The Columbia Moulding Company
Walter Land Company
Gamble Brothers, Inc.

Monarch America, Inc.

At the same time Celotex owned all of the outstanding voting securities of the following subsidiaries:

Jim Walter Export, Inc.
Celotex Canada Limited
Jim Walter Research Corp.
Celotex Limited
Miami Carey Ltd.
Carey Canadian Mines, Ltd.

(CX 35M).

[6] 6. For its fiscal year ending August 31, 1971, consolidated sales and revenues of JWC and its subsidiaries were $710,029,000 and consolidated earnings were $32,449,000 (CX 28, at 12; CX 33X). For its fiscal year ending August 31, 1972, JWC reported consolidated revenues of $885,172,000; total assets of $983,217,000; and a net income of $44,568,000 (Complaint and Answer, par. 3; CX 29X; CX 35G). For its fiscal year ending August 31, 1973, JWC reported consolidated sales and revenues of $1,068,636,000; total assets of $1,081,999,000; and net income of $54,097,000 (CX 30B; CX 36F).

7. The JWC organization has grown through a series of acquisitions. In the ten year period preceding the filing of the complaint in July 1974, JWC or its subsidiaries acquired no fewer than 17 separate companies with cash and/or stock (Complaint and Answer, par. 3). The following were among the more prominent acquisitions by JWC:

a. Celotex stock – 34% in 1962, the balance by 1964 (CX 28, at 20, 21; CX 33B; CX 35B);

b. Edwards Power Door Company, Inc., Mount Vernon, New York, in 1965, which became a part of Celotex in 1971 (CX 8A; CX 17I; CX 28, at 21);

c. Brentwood Financial Corporation, Los Angeles, California, in 1966, an operator of savings and loan companies and an insurance agency (CX 8A; CX 17I);

d. Barrett Building Materials Division of Allied Chemical Corporation in 1967. The Division later became a part of Celotex (CX 8A; CX 28, at 21; CX 45; CX 47);

e. Alger-Sullivan Company, Inc., Century, Florida, in 1967, a producer of laminated railroad flooring. In 1971, it also became a part of Celotex. (CX 8A; CX 17I);

f. Marquette Paper Corp. of Chicago, Illinois, in 1968 (CX 8A; CX 17J);

g. Gilbert C. Van Camp Insurance Agency in 1968 through the Brentwood subsidiary (CX 8A; CX 17J); [7]

h. Majestic Carpet Mills, Inc., Georgia, in 1968, which later became a part of Celotex (CX 8A; CX 28, at 21; CX 17J);

i. Knight Paper Corporation, Jacksonville, Florida, in 1968 (CX 8A; CX 28, at 21);

j. Georgia Marble Company, in 1969, which mines or quarries granite, marble, limestone and other minerals (CX 8A; CX 17K);

k. Mohawk Tablet Company, in 1969, through its Marquette Paper subsidiary (CX 8A; CX 17J);

l. United States Pipe and Foundry Company of New Jersey, in 1969 (CX 8A; CX 17J);

m. Columbia Moulding Company, in 1970 (CX 8A; CX 17L; CX 28, at 22);

n. Aetna Savings and Loan Association of Los Angeles, in 1971, through its Brentwood subsidiary (CX 8A; CX 53);

o. Monarch America, Inc. of St. Louis, Missouri, in 1972, a manufacturer of metal weather stripping (CX 17L; CX 29F; CX 54);

p. North American Door Corporation, Lindenhurst, New York, in 1972, which became a part of Celotex (CX 17M; CX 55);

q. Gamble Brothers, Louisville, Kentucky, in 1972 (CX 9B; CX 29F; CX 56);

r. Marble Products Company, Atlanta, Georgia, in 1972, which became a part of Georgia Marble (CX 9B; CX 30E);

s. D.J. Dinsmore of South Dakota in 1972, a producer of window sash products (CX 9B; CX 30E);

t. Christian Wood Products in 1972, which was combined with Gamble Brothers (CX 9B; CX 30E);

u. Crown Tough Carpets Division from Johns-Manville Corporation in 1973 (CX 9B). [8]

8. William Frack, a JWC Vice-President in charge of corporate expansion programs and with no employment relationship to Celotex, participated in the negotiations for most of JWC's acquisitions from 1968 through 1974 (Frack, Tr. 389, 397–404).

9. The companies acquired by JWC during the period 1968–1973 were headquartered in various states and did business in interstate commerce (Frack, Tr. 411–12).

10. JWC was, at the date of the acquisition, engaged in commerce as "commerce" is defined in the Clayton Act (15 U.S.C. 12) (Findings 11–14).

11. JWC subsidiaries are operated as integral parts of the JWC

organization (*see, e.g.*, CX 28, CX 29; Findings 3, 23), and these subsidiaries engage in interstate commerce (Findings 9, 22).

12. In connection with the negotiations for the acquisition of Panacon, officers of JWC traveled several times between JWC headquarters in Tampa, Florida, and New York City (Frack, Tr. 390–93).

13. JWC has borrowed money from commercial banks located in a number of states. It has long term loan agreements with Continental Illinois National Bank and Trust of Chicago, Chase Manhattan Bank, First National City Bank, First National Bank of Chicago, Bank of New York, National Bank of Detroit, Chemical Bank, and Cleveland Trust Company (CX 49B). The funds used by Celotex to purchase the Panacon stock were borrowed by JWC from a group of commercial banks (CX 39B).

14. The common stock of JWC has been registered and traded on the New York Stock Exchange since 1964 (CX 28, at 21). JWC has listed securities on the New York, Midwest, and Pacific Stock Exchanges (CX 32B; CX 33A; CX 35A; CX 36A; CX 37A; CX 52; CX 53; CX 54; CX 55; CX 56). Its transfer agents have included the First National City Bank in New York, the Central National Bank of Cleveland, Ohio, and the First National Bank of Chicago, Illinois (CX 28, at 27). [9]

B. The Celotex Corporation

15. Celotex is a corporation organized and existing under the laws of the State of Delaware. It was in 1972, and is now, a wholly-owned subsidiary of JWC (CX 35M, Admissions No. 1).

16. Celotex and its subsidiaries manufacture and distribute a variety of building material products throughout the United States. Among these products are asphalt roofing products, including residential roofing, roll roofing, and felts, and asphalt coatings and accessories. Celotex also produces gypsum wallboard insulation products, acoustical products, and siding (CX 33B; CX 35B; CX 36B; McMurry, Tr. 1267).

17. In 1971, Celotex operated a total of 22 plants in the U.S. and one in Canada (CX 33J). In 1972, after the merger of Panacon, Celotex operated 29 plants located throughout the U.S. and one in Canada (CX 35K). By 1973 the number of plants had grown to 31 (CX 36L).

18. In 1967, Celotex increased its roofing capacity from one plant to eight when the Barrett Building Materials Division of Allied Chemical Corporation was acquired by JWC and merged into Celotex (CX 28, at 21; CX 45).

19. In 1972, Celotex operated roofing plants at Birmingham, Alabama; Camden, Arkansas; Chester, West Virginia; Chicago, Illinois; Edgewater, New Jersey; Los Angeles, California; Philadelphia, Pennsylvania; and San Antonio, Texas. It had dry felt mills at Camden, Arkansas; Peoria, Illinois; Los Angeles, California; Philadelphia, Pennsylvania; and San Antonio, Texas (CX 2B).

20. As of August 31, 1971, JWC estimated that Celotex was the fourth or fifth largest manufacturer of asphalt roofing products in the United States (CX 33D) and in all of 1971 shipped asphalt roofing products into 47 states and the District of Columbia (CX 70, *in camera*). By August 31, 1972, after the merger of Panacon into Celotex, JWC estimated that Celotex was the second largest manufacturer of asphalt roofing products (CX 35E). [10]

21. At the time of the acquisition, Celotex was in the process of building a new roofing plant in Goldsboro, North Carolina. The Goldsboro plant was an entirely new, high speed, large capacity plant which was planned to include a felt mill and to produce a full line of roofing products. Its capacity was at least twice that of Panacon's proposed plant at Hopewell, Virginia (*see* Findings 42–43). The plant cost $9–12 million (Cordell, Tr. 1232; Di Salvo, Tr. 1829–30), and was scheduled to become operational in 1973 (CX 28, at 4).

22. Celotex was in 1972, and is now, engaged in trade or commerce among several states (Admissions, par. 12), and is engaged in commerce as "commerce" is defined in the Clayton Act (15 U.S.C. 12).

C. *Relationship Between Jim Walter Corporation and Celotex*

23. Although Celotex is maintained as a separate corporate entity, having its own officers and separate books of accounts, corporate minutes and other corporate records (Cordell, Tr. 1208–09; RX 55; RX 56), it is operated as an integral part of the JWC organization. In its annual reports, JWC refers to Celotex as the "Celotex Division" (CX 28F; CX 29L; CX 30L) and publishes consolidated financial statements which include the assets, earnings and liabilities of Celotex and other subsidiaries (CX 27–31). JWC also incorporates the accounts of all companies which are over 50 percent owned by it, including Celotex, in reports filed with the Securities and Exchange Commission (Admissions, par. 5; CX 32–39).

24. JWC sets the general policies regarding salaries and promotions for Celotex, but specific decisions on salaries, hiring and promotions are made by the Celotex management (Di Salvo, Tr. 1767–68).

25. JWC operates a stock option program for employees of Celotex (Di Salvo, Tr. 1769–70). The plan allows full-time employees of all JWC domestic subsidiaries, including Celotex, to purchase JWC common stock (CX 58; CX 60). [11]

26. Celotex does not operate a separate legal department. Legal services are secured from JWC on a request basis either from in-house attorneys or from outside sources (Di Salvo, Tr. 1775–76).

27. Celotex is in charge of its own advertising, which often bears the name of JWC (Di Salvo, Tr. 1776–77). Top management of JWC tries to establish and promote the name and image of the Jim Walter Corporation itself, rather than the brand names of its corporate subsidiaries, such as Celotex (Cordell, Tr. 1212–13).

28. Celotex does not maintain a research department for its exclusive use. The Jim Walter Research Corporation, a wholly-owned subsidiary of Celotex, conducts research for all the divisions of Celotex and for the other companies within the JWC organization. The Jim Walter Research Corporation is maintained as a separate profit center. Celotex is billed for its services on a monthly basis, and maintains an annual budget for research expenditures (Di Salvo, Tr. 1756–57; Hasselbach, Tr. 1476, 1495B; *see* RX 600–603).

29. JWC exercises extensive control over the business activities of Celotex. JWC appoints or elects all of the members of the Board of Directors of Celotex (Admissions, par. 2), and there is substantial overlap between the officers and directors of the two corporations.

30. The following chart identifies the positions that the members of the Board of Directors of Celotex occupied with JWC at the time of the acquisition of Panacon in April 1972:

	Celotex	*JWC*
J. O. Alston	Director	Vice-Chairman Director
William Herbert	President Director	(Herbert became Vice-President in 1972 and Sr. Vice-President and Director in June 1973)
Eugene Katz	Director	Vice-President Director
Richard Thompson	Vice-President Director	Vice-President Secretary
James Walter	Chairman	Chairman

(CX 8B; CX 10; CX 30I; CX 37–0; CX 42; CX 43C).

[12] In addition, one of Celotex's Vice-Presidents, Mr. Cordell, was a director of JWC and JWC's Senior Vice-President and Treasurer (CX 8B; CX 10). Mr. Cordell is now both President of JWC and Vice-President of Celotex (Cordell, Tr. 1205–06). Four of Celotex's six other vice-presidents were also officers of JWC in 1972 (CX 8B; CX 10).

31. Celotex's acquisition of Panacon was for the most part planned and negotiated by officials of JWC (Findings 46–51).

32. Celotex made the acquisition of Panacon with funds borrowed from JWC. Celotex lacks authority to borrow from commercial banks because of restrictions contained in loan agreements between JWC and its long-term lenders (Cordell, Tr. 1213–14, 1228; Di Salvo, Tr. 1776).

33. The management of JWC and the management of Celotex occupy the same headquarters office building in Tampa, Florida (Admissions, par. 3).

II. PANACON CORPORATION, THE ACQUIRED COMPANY

34. Prior to April 17, 1972, Panacon Corporation was a corporation chartered and operating under the laws of the State of Michigan, with its principal place of business at 320 South Wayne Ave., Cincinnati, Ohio (Complaint and Answer, par. 6).

35. The Glen Alden Corporation owned approximately 89 percent of the outstanding two classes of stock of Panacon Corporation prior to April 1972 (Complaint and Answer, par. 6).

36. Panacon is the surviving corporation of a merger effected on April 9, 1970, whereby the Philip Carey Corporation, an Ohio corporation, was merged into Briggs Manufacturing Company, a Michigan corporation, with the survivor's name changed to Panacon Corporation (CX 39G; Tennesson, Tr. 416–17).

37. Panacon manufactured a wide range of products for residential and commercial construction and industrial applications. At the time of the acquisition, Panacon was organized into six divisions: the Philip Carey Company, which manufactured roofing and other building materials (hereinafter Philip Carey/Panacon); Briggs Manufacturing Company, which produced sanitary plumbing ware; Republic Heater Corporation, which manufactured water heaters; Miami Carey and Miami Carey Ltd., which produced residential products including bathroom and [13] kitchen equipment; and Carey Canadian Mines, which was engaged in the mining of asbestos fibers (Tennesson, Tr. 414–15; CX 25, at 8–14; CX 26, at 6–10). For the year ending December 31, 1971, Panacon reported revenues of approximately $181,129,000, total assets of approximately $106,008,000; and

net profits consisting of income before extraordinary items of $6,138,293 plus tax benefits from utilization of federal income tax operating loss carry forward of $4,453,000 (Complaint and Answer, par. 7).

38. In 1972, Panacon had approximately 5500 employees in the United States and Canada (CX 39T).

39. In 1970, Philip Carey/Panacon produced more than 200 different building and industrial products. It was principally engaged in the manufacture of asphalt shingles and prepared roofing materials. It owned plants in Cincinnati (Lockland), Ohio; Linden and Perth Amboy, New Jersey; Houston, Texas; Memphis, Tennessee; and Wilmington, Illinois (CX 25, at 12).

40. Philip Carey/Panacon was a major manufacturer of asphalt and tar roofing products in the United States, and was a direct competitor of Celotex (Mulligan, Tr. 192; Jenkins, Tr. 580–81; Kingery, Tr. 738; Black, Tr. 1395).

41. Sales of Philip Carey/Panacon were approximately $89 million in 1971 (CX 44C).

42. At the time of the acquisition, Philip Carey/Panacon was about to construct a new roofing plant in Hopewell, Virginia to serve the Mid-Atlantic and Southeast areas of the United States. It had acquired an option on land, secured approval for the money to finance the project, ordered equipment, and conducted engineering studies (CX 26, at 9; Tennesson, Tr. 424; Di Salvo, Tr. 1723).

43. The Hopewell plant was to be built for an estimated $2 million, using a simple warehouse-type building and as much used machinery as possible. The proposed plant was a small one, with a limited capacity and no felt mill (Tennesson, Tr. 442, 467–69; Di Salvo, Tr. 1829–30). After the acquisition by Celotex, plans for construction of the Hopewell plant were abandoned (Tennesson, Tr. 425). [14]

44. In 1971, Philip Carey/Panacon distributed asphalt roofing products in 42 states and the District of Columbia (CX 70, *in camera*).

45. Panacon was engaged in interstate commerce at the time of the acquisition (Complaint and Answer, par. 9).

III. THE ACQUISITION OF PANACON

46. Negotiations for the acquisition began in the fall of 1971 when Stanley Mirsky, a merger broker representing the Glen Alden Corporation, which owned 89 percent of the common stock of Panacon, contacted William A. Frack, Jr., JWC's Vice-President for Corporate Development and Expansion, to notify him of the

availability of Panacon as an acquisition candidate (Frack, Tr. 389–90; 407–08).

47. Following the initial contact, Frack was actively involved in preparing for and attending meetings with Glen Alden personnel during the entire course of the negotiations which lasted approximately four months (Blaney, Tr. 334; Frack, Tr. 390–93). In addition to Frack, the early negotiations were attended by Frank Pizzitola, the President of JWC; Bernard Blaney, the Vice-President and Assistant Treasurer of Glen Alden; and Isidore Becker, a member of Glen Alden's Board of Directors (Frack, Tr. 390). Neither Frank Pizzitola nor William Frack was an officer or a director of The Celotex Corporation (CX 10; CX 42; Frack, Tr. 388–89, 391; Cordell, Tr. 1232).

48. Mr. Cordell, Senior Vice-President and Treasurer of JWC and Vice-President of Celotex, became involved in the negotiations (Frack, Tr. 409–10; Cordell, Tr. 1206, 1218–19), and Mr. Pizzitola and Mr. Cordell went to Lockland, Ohio, to inspect the Panacon operations (Cordell, Tr. 1218–19).

49. Charles E. Tennesson, Jr., Panacon's President and Chief Operating Officer, participated in several meetings during the negotiations. The first of those meetings was attended only by Messrs. Tennesson and Pizzitola (Tennesson, Tr. 435). During this session, Mr. Pizzitola outlined to Mr. Tennesson the benefits to Panacon of becoming a part of JWC, a large, growing organization. The name of Celotex was not mentioned during these discussions (Tennesson, Tr. 435–37). [15]

50. Mr. Frank Pizzitola and Mr. Jim Walter, the Chairman of the Board of JWC, met with Mr. Tennesson and other representatives of Glen Alden in early March 1972 (Tennesson, Tr. 437). Mr. Tennesson also had several meetings with Mr. Cordell in New York City (Cordell, Tr. 1209).

51. During the negotiations, it was understood by the Panacon representatives that JWC would acquire Panacon (Tennesson, Tr. 439–37; *see* Frack, Tr. 392). The terms of the acquisition were agreed upon by Mr. Jim Walter, Chairman of the Boards of JWC and Celotex, and Mr. Meshulam Riklis, Chairman of the Board of Glen Alden Corporation (Frack, Tr. 392). The ultimate decision to acquire Panacon was made by the Board of Directors of JWC (Frack, Tr. 406).

52. On April 3, 1972, JWC and Glen Alden issued a joint press release announcing an agreement in principle whereby JWC would acquire Glen Alden's 89 percent stock interest in Panacon, subject to a satisfactory definitive agreement (CX 38D).

53. On the same day, Mr. Jim Walter forwarded to each member

of the Board of JWC a memorandum relating to the proposed acquisition of Panacon (CX 44; Frack, Tr. 393). The memorandum discussed the effects on JWC of three alternative methods of purchasing Panacon: cash; JWC convertible debentures; and JWC common stock (CX 44H, I; Frack, Tr. 394).

54. A draft agreement, dated April 11, 1972, which identified JWC and Glen Alden as the principals, was circulated between the parties (CX 62D–P; Blaney, Tr. 330). On April 12, 1972, the Executive Committee of Glen Alden approved the draft agreement. At this same meeting, Glen Alden's Executive Committee unanimously resolved that the corporation would sell its shares of capital stock of Panacon to JWC (CX 62; Blaney, Tr. 330).

55. JWC often included in contracts for the purchase of companies a provision allowing JWC to assign the contract to one of its subsidiaries (Cordell, Tr. 1216). Such a provision was included in the contract for purchase by JWC of the assets of the Barrett Division of Allied Chemical Corporation (CX 45Z–21). A similar provision was contained in the draft agreement between JWC and Glen Alden (CX 62–0). [16]

56. Some time after April 12, 1972, it was decided that Celotex rather than JWC would purchase the Panacon stock (Blaney, Tr. 330).

57. On April 14, 1972, the Board of Directors of JWC met to discuss "the proposed transaction whereby the corporation would acquire" approximately 89 percent of the stock of Panacon (CX 43A). The Board approved the acquisition and urged the management to consummate the transaction (CX 43B).

58. On April 14, 1972, the Board of Directors of Celotex met and authorized its officers to execute an agreement with Glen Alden (CX 42).

59. On April 17, 1972, Celotex purchased Glen Alden's Panacon stock (6,528,739 shares of common and 7,356,000 shares of Class A common) using $62 million advanced by JWC, which had borrowed it from a group of commercial banks (CX 39B; CX 39Z–28 – Z42; Blaney, Tr. 328; Admissions, pars. 20–22). This accounted for about 89 percent of the shares outstanding (Complaint and Answer, par. 10). That same day, JWC issued a press release announcing that it had purchased Panacon stock from Glen Alden. No mention was made of Celotex (CX 23B). On April 20, 1972, the Board of Directors of JWC confirmed and ratified the purchase of the stock by Celotex (Admissions, par. 24). Effective June 29, 1972, the remaining 11 percent of Panacon stock was acquired by Celotex (CX 29Z–2). The

total cost of the stock was approximately $73 million (Complaint and Answer, par. 10).

60. Immediately following the purchase of the stock Messrs. Walter, Pizzitola and Cordell were elected to the Board of Directors of Panacon. Mr. Pizzitola was also elected President and Chief Executive Officer of Panacon (CX 23C; CX 40C). All of these men were members of the Board of Directors and officers of JWC; Messrs. Walter and Cordell also held positions with Celotex (Finding 30).

61. A "Notice of Delayed Annual Meeting of Stockholders," dated May 31, 1972, was addressed to stockholders of Panacon and announced a meeting to elect a Board of five directors (CX 40). The following chart lists the five nominees and their principal occupations, as described in the notice. [17]

J. W. Walter	Chairman and Director of JWC
F. J. Pizzitola	President (since 1970) and Director of JWC. For three years prior thereto he was a Vice-President of Celanese Corporation, a chemical manufacturer.
J. B. Cordell	Senior Vice-President and Treasurer and director of JWC.
B. F. Harrison	President (since 1970) of United States Pipe and Foundry Company ("U.S. Pipe"), Birmingham, Alabama, a wholly-owned subsidiary of JWC. For more than three years prior thereto he was a Vice-President of U.S. Pipe; also a director of JWC (since 1970).
J. Warren Frazier	Attorney, partner of Shackelford, Farrior, Stallings & Evans, Tampa, Florida, General Counsel for JWC.

(CX 40C)

62. On May 31, 1972, and June 28, 1972, the Board of Directors of Celotex unanimously approved a resolution authorizing the merger of Panacon into Celotex (RX 64B, G).

63. The shareholders of Panacon voted to merge Panacon into Celotex on June 28, 1972. The merger took place on June 30, 1972, after approval by the Board of Directors of Celotex of the plan of

merger and consent of the sole shareholder of Celotex, JWC (Answer, par. 10(b), (c); RX 64A-H; Tr. 2151-52).

64. Subsequent to the merger, Philip Carey/Panacon and Carey Canadian Mines, Ltd., operated in the Celotex Division. Miami Carey, Miami Carey Ltd., and Briggs Manufacturing Company, all previously part of Panacon, were included in different operating groups of JWC (CX 29L, P).

65. It is clear from the record as a whole that JWC actively participated in direction of the course of events leading up to and following the acquisition by Celotex of the Panacon stock. JWC's role in the acquisition is illustrated by a statement contained in a report filed by JWC with the Securities and Exchange Commission on May 8, 1972: [18]

> . . . Walter [JWC] and Celotex anticipate that the shareholders of Panacon would receive an amount of cash (as yet undetermined) for their shares of Panacon. As of the date hereof, Walter and Celotex have not decided whether such anticipated action should be accomplished by a liquidation, sale of assets, statutory merger, or otherwise.

(CX 39B)

IV. LINE OF COMMERCE

A. Roofing Products

66. "Roofing products" are materials used to shelter the interior of a structure from the effects of weather, and in particular, to prevent entry of water. A wide variety of materials can be, and are, utilized for this purpose in the United States. These include asphalt shingles, wood shakes and shingles, clay, concrete, cement and asbestos-cement tile, plastic shingles, metal shingles of steel and aluminum, fiberglass sheets, flat and corrugated aluminum sheets, terne, an alloy of tin and lead (Woodward, Tr. 1835) sheets, copper sheets, corrugated galvanized iron sheets, slate, asphalt saturated felts, tar saturated felts, asphalt roll roofing, and rubber and plastic (elastomeric) sheets (Whittemore, Tr. 160-161, 166; Jenkins, Tr. 570; Hasselbach, Tr. 1380; Linck, Tr. 1535, 1551-1552; Taylor, Tr. 1603; Hogan, Tr. 2129).

67. Each of these products is, in the broadest sense, competitive with the others (Taylor, Tr. 1603; Woodward, Tr. 1833-38; 1840; Humphreys, Tr. 1996; McMahon, Tr. 2105-08; Hogan, Tr. 2128-29; Peterson, Tr. 2185; Tinnell, Tr. 2222).

B. Asphalt and Tar Roofing Products

68. Asphalt and tar roofing products have been in use in the

United States since 1893 (CX 1, at 1). They are applied to residential, commercial and industrial roofs, and account for at least 80 percent of all roofing applied in the nation (CX 1, at 1; Snow, Tr. 685–87; Kingery, Tr. 756, 800; McMurry, Tr. 1274; Musser, Tr. 1646; Humphreys, Tr. 2044).

69. Asphalt and tar roofing products are sold and used in every part of the United States (Tennesson, Tr. 470; Snow, Tr. 683; Kingery, Tr. 739; McMurry, Tr. 1238). In contrast, slate, concrete and clay tile, wood shingles and shakes, and asbestos-cement shingles [19] tend to be fairly localized in use (Tennesson, Tr. 460–70). Wood shakes and shingles, while found throughout the United States, are most popular in the Pacific Northwest, California and Texas (Snow, Tr. 683; RX 66; RX 67; RX 68; RX 69; RX 70), with almost 60 percent of all red cedar shingles and shakes shipped into three states (Peterson, Tr. 2197). Clay and concrete tile complement the Spanish architecture of Southern California, Arizona, and Florida (Snow, Tr. 683). Use of slate is primarily confined to Pennsylvania and New England (McMurry, Tr. 1239).

70. There are three basic types of asphalt and tar roofing products: asphalt or tar saturated felts; asphalt roll roofing; and asphalt shingles (CX 1, at 12; Whittemore, Tr. 101; Mulligan, Tr. 178–79, 187). In addition, various accessory items, including coatings, cements, fasteners, and adhesives are used in connection with asphalt and tar roofing products to complete a roof system (CX 1, at 16–18). Shingles, or prepared roofing products, are fastened in overlapping fashion to the roof deck and are not completely sealed. As a result, they are used on more steeply pitched roofs. Built-up roofs are constructed over the roof deck with successive plies of asphalt or tar saturated felts and roll roofing, bonded with asphalt or coal tar pitch. Built-up roofs may be used on flat or low slope roofs (Whittemore, Tr. 107–08; Tennesson, Tr. 415–16; CX 1, at 20).

71. Manufacture of asphalt and tar roofing products involves two separate production steps: (1) fabrication of a base fiber; and (2) conversion of this base fiber into a finished roofing product (CX 1, at 3, 4, 7; Jenkins, Tr. 570). The base fiber serves as the asphalt or tar "carrier" and furnishes strength; the asphalt or tar acts as a binder and provides waterproofing capabilities to the product (Jenkins, Tr. 570; Snow, Tr. 679; Morris, Tr. 819).

72. Asphalt and tar roofing products may be made on a variety of bases, most often asbestos felt, organic felt, or fiberglass mat (Kingery, Tr. 740; Snow, Tr. 1125–27).

73. Organic felts are made from wood, wood chips, newspapers, cartons, rags, wood flour, and other cellulose materials; inorganic

felts are made from asbestos or fiberglass fibers (Whittemore, Tr. 101; Di Salvo, Tr. 1730). Despite some differences in raw material inputs, organic-based and inorganic-based asphalt and tar roofing products are similar in production, use, and performance (Snow, Tr. 679, Kingery, Tr. 740–41). [20]

74. Saturated felts are organic or inorganic "sheets" which have been saturated or impregnated with asphalt or tar (Whittemore, Tr. 102; Snow, Tr. 1106; Hasselbach, Tr. 1356–57); their principal uses are as plies in built-up roof systems or as underlayments for asphalt shingles or other shingles or tiles (Whittemore, Tr. 108; Mulligan, Tr. 186; Tennesson, Tr. 415; McMurry, Tr. 1272; McMahon, Tr. 2120; CX 1, at 12).

75. Roll roofings are asphalt saturated or impregnated felts or dry fiberglass or asbestos mats which have been coated with viscous asphalt. These products may be used in place of saturated felts, and result in the need for fewer plies when used as part of a built-up roofing system (CX 1, at 12; Whittemore, Tr. 102–03; Jenkins, Tr. 571; Kingery, Tr. 739–40; Hogan, Tr. 2142–43; Conley, Tr. 2265).

76. Smooth-surfaced roll roofing typically has a fine surfacing applied to its top and back to act as a binding agent. Mineral surfaced roll roofing is made by surfacing the weather side of roll roofing with colored mineral granules. Both smooth-surfaced and mineral-surfaced roll roofings serve as temporary and utility roof coverings or as components to built-up roof systems (Whittemore, Tr. 102–03, 133, 139; Mulligan, Tr. 186; Hasselbach, Tr. 1350–52; CX 1, at 12).

77. Asphalt shingles are mineral-surfaced roll roofing cut into strips or designs for use on steeper sloped roof decks (Whittemore, Tr. 102, 107–08; Mulligan, Tr. 186–87; CX 1, at 12).

78. Two other asphalt roofing products, "Ondeline" and "Decromastic," are not as widely used as saturated felts, roll roofing and shingles and do not appear to fit within the definition of asphalt and tar roofing products by which our consideration of this matter has been guided. "Ondeline" is a mineral-surfaced, asphalt product manufactured in France and sold in corrugated sheet form for use as siding as well as roofing (Woodward, Tr. 1835–36). "Decromastic" is made from galvanized corrugated iron sheets, coated with asphalt and covered with roofing granules for use for roofing (McMahon, Tr. 2107–08). The record evidence does not indicate their use is significant. [21]

79. The full-line manufacturers of asphalt and tar roofing products produce saturated felts, roll roofing, and asphalt shingles (Mulligan, Tr. 189–90; Jenkins, Tr. 570; Snow, Tr. 678–79; Tinnell, Tr.

2212). One measure of the competitive strength of an asphalt roofing company is its total sales of these three product categories (Mulligan, Tr. 190). The trade association of asphalt roofing manufacturers collects production statistics from its members for these products (CX 4; CX 5; CX 6).

80. Asphalt and tar roofing products have peculiar characteristics and uses which make them an appropriate line of commerce within which to assess the competitive effects of the acquisition challenged in this proceeding.

(1) Industry Recognition

81. The Asphalt Roofing Manufacturers Association (ARMA) is a nonprofit trade association which exists to promote the sale and use of asphalt and tar roofing products (Whittemore, Tr. 106–07). As part of its sponsored activities the association conducts public relations programs; participates in advertising ventures; lends financial support for industry research; maintains contacts with the National Bureau of Standards, the Federal Housing Administration, and other federal agencies; urges the American Society for Testing and Materials (ASTM) and Underwriters' Laboratories (UL) to establish appropriate standards for asphalt and tar roofing products; and acts as a liaison with roofing contractors (Whittemore, Tr. 107, 124–25).

82. Regular membership in ARMA is restricted to domestic manufacturers of asphalt and/or tar roofing products. The association makes no distinctions between manufacturers of organic and inorganic products for membership purposes. Companies which supply raw materials for asphalt and tar roofing products are eligible for associate memberships in ARMA (Whittemore, Tr. 106, 112–13). Prior to the subject acquisition both Philip Carey and Celotex were members of ARMA (Whittemore, Tr. 106). It was estimated by the managing director that ARMA members account for 85 percent of the total production of asphalt and tar roofing products annually (Whittemore, Tr. 148). [22]

83. The managing director of ARMA compiles a list of all known domestic manufacturers of asphalt and tar roofing products together with their roofing plant and dry felt mill sites (CX 2; CX 3; Whittemore, Tr. 116–17). The list is updated periodically in an attempt to identify all plants operating in the United States (Whittemore, Tr. 116, 122).

84. As a service to its regular members, ARMA employs a private accounting firm to collate statistics on member shipments of asphalt and tar roofing products. The report questionnaire requests information of each participating member's shipments of mineral and

smooth-surfaced roll roofing, various categories of asphalt shingles, and saturated felts (CX 4; CX 5; CX 6; Whittemore, Tr. 131–32). ARMA members use the results of their association's survey as a yardstick for gauging their competitive success in particular states and in the nation (Whittemore, Tr. 128).

85. Industry members acknowledged the existence of a separate and distinct asphalt and tar roofing industry (Snow, Tr. 699; Kingery, Tr. 757, 799–800).

86. Industry witnesses also testified that other asphalt and tar roofing manufacturers were their primary competitors (Snow, Tr. 687; Kingery, Tr. 738–39; Malarkey, Tr. 1958).

(2) Peculiar Characteristics

a. Composition

87. Asphalt and tar roofing products derive from an organic or inorganic substrate saturated or impregnated with asphalt or tar. From this basic processing, the saturated felt may then be coated with a viscous asphalt (smooth-surfaced roll roofing), embedded with mineral granules (mineral-surfaced roll roofing), and cut into strips or patterns (asphalt shingles) to complete the line of asphalt and tar roofing products. This similarity of composition of asphalt and tar roofing products contrasts with the varied physical make-up of other roofing products: wood shakes and shingles are slices of a tree section (RX 65D; RX 103; RX 104; RX 500); slate are quarried slabs of stone (McMurry, Tr. 1239); metal shingles or corrugated sheets are formed or machined metals (RX 114); cement tile, concrete tile, clay tile, and asbestos-cement shingles are all molded, cast, or extruded mineral compositions (RX 62; RX 105; RX 106; RX 107; RX 108; RX 109; RX 110; RX 111; RX 112; RX 113; Snow, Tr. 684). [23]

88. Both the American Society for Testing and Materials (ASTM) and Underwriters Laboratories (UL) have established standards for the composition and performance of asphalt and tar roofing products. UL standards set minimum weight and composition characteristics and prescribe criteria for fire and wind resistance for products which qualify for UL ratings (CX 1, at 91–92; CX 7; Whittemore, Tr. 125). These standards represent industry minimum requirements for acceptability; domestic manufacturers of asphalt and tar roofing products adhere to these quidelines for at least some products of each type of roofing material (Mulligan, Tr. 185; Linck, Tr. 1540; Waltz, Tr. 1672; Tinnell, Tr. 2243).

89. Different brands of asphalt and tar roofing products which have the same ratings are virtually indistinguishable in quality and

performance, with only minor cosmetic variations (Jenkins, Tr. 600–01; Snow, Tr. 684; Kingery, Tr. 801; Wehner, Tr. 1430–31; Humphreys, Tr. 2040–41).

b. Fire Resistance

90. Asphalt and tar roofing products rated by UL as Class A do not readily ignite, but inhibit the spread of flames and materially lessen the hazard to adjacent structures posed by fiery brands (CX 1, at 1, 91–92; CX 7; Conley, Tr. 2272–73). Prior to the subject acquisition both Philip Carey and Celotex promoted brand name, Class A asphalt shingles, "Fire Chex" and "Bar Fire," respectively, to those concerned with superior fire resistance (Hasselbach, Tr. 1486–88).

91. No wood shingle or shake can achieve a Class A UL fire rating. Only if a wood shingle is specially pressure treated can it merit a Class B or C rating. This special processing results in at least a doubling of the cost of these wood shingles (Peterson, Tr. 2200–01). [24]

c. Versatility

92. In contrast with roofing products composed of other materials, asphalt roofing products are used in every part of the United States and on residential, industrial and commercial buildings. They are the most widely used of all roofing materials (Finding 68).

d. Economy

93. The installed cost of roofing materials varies around the nation (Musser, Tr. 1641). However, asphalt and tar roofing products appear to be uniformly less expensive in initial installed cost than other roofing materials (Snow, Tr. 682; Kingery, Tr. 801). For example, a roofing contractor from Illinois estimated that asphalt shingles would cost $40–$80 per square (100 square feet of covered surface), while clay tile would cost $120–$130; slate, $140–$150; and wood shingles, $105–$125 per square (Taylor, Tr. 1612). Likewise, a Celotex employee estimated installed costs per square of roofing materials in the Tampa, Florida, area to be as follows: asphalt shingles, $40–$90; clay tiles $200–$250; slate, $300–$360; and wood shakes $90–$120 (Musser, Tr. 1636–41). Some roofing materials have substantially longer expected life spans than do asphalt and tar products. Estimated life spans for various products in the Tampa, Florida, area are as follows: ashpalt shingles, 15–25 years; clay tiles, 50 years or more; slate, 50 years or more; wood shakes, 25 years or

more (Musser, Tr. 1636–41). Another industry witness estimated that a built-up asphalt roof would last about 20 years, whereas metal roofs costing two to four or more times as much would last 100 years or longer (Linck, Tr. 1558–59).

(3) Unique Production Facilities

94. Asphalt and tar roofing products are manufactured in the following manner: (1) a jumbo roll of dry felt or fiberglass or asbestos mat is placed on the beginning of a roofing machine; (2) the felt is fed through a saturating tank or spray saturator to produce an asphalt or tar saturated felt; (3) the saturated felt or fiberglass or asbestos mat is coated with a viscous asphalt mixture to create smooth-surfaced roll roofing (with the addition of a fine surfacing material); (4) mineral granules are [25] embedded in the coating asphalt by pressure rolls to make mineral-surfaced roll roofing; and (5) mineral-surfaced roll roofing is fed through a shingling machine where it is cut into strips or individual shingles (CX 1, at 3, 7–9; Jenkins, Tr. 570–72; Snow, Tr. 680).

95. Production of various asphalt or tar roofing products can be accomplished on one continuous line. By discontinuing the production sequence at appropriate points a manufacturer can obtain saturated felts, smooth-surfaced roll roofing, or mineral-surfaced roll roofing. Permitting the materials to run the full course produces asphalt shingles (CX 1, at 3, 7–9). The same machinery could be used to manufacture all those asphalt and tar roofing products (Whittemore, Tr. 149; Snow, Tr. 681, 1103–06; Kingery, Tr. 737–38) with only a change of the dip tank necessary to run tar (Hasselbach, Tr. 1497) and some modifications for running fiberglass mats (Jenkins, Tr. 581; Hogan, Tr. 2142–43; Conley, Tr. 2275).

96. Other roofing products cannot be manufactured on machinery used to make asphalt and tar roofing products (Jenkins, Tr. 581; Snow, Tr. 681–82; Kingery, Tr. 755; Humphreys, Tr. 2044). For example, manufacture of wood shingles and shakes is radically dissimilar to the production steps for asphalt and tar roofing (RX 500) as is the mining, extrusion and firing necessary to produce clay tile (McMahon, Tr. 2102).

97. With only minor exceptions (Snow, Tr. 679–80), the companies which manufacture asphalt and tar roofing products manufacture no other types of roofing products (RX 54).

(4) Distinct Prices

98. Prices for asphalt roofing products are distinct from those of

other roofing products (Finding 93). Both manufacturers and customers testified that prices for asphalt and tar roofing products do not differ significantly from one manufacturer to another (Mitzman, Tr. 355; Black, Tr. 1395, 1406; Wehner, Tr. 1430, 1444; Wolff, Tr. 1881; Hogan, Tr. 2136). The industry manufacturers follow a pricing policy of offering discounts from published list prices. Not only are the list prices virtually identical, but the discounts rarely vary substantially (Mitzman, Tr. 343, 355; Tinnell, Tr. 2228). [26]

99. Manufacturers of asphalt and tar roofing products compete with one another on the basis of service as well as price (Mulligan, Tr. 207; Imbus, Tr. 255–56; Waltz, Tr. 1679–80; Wolff, Tr. 1864). Good service includes the ability to supply from plants located near the customer, to respond promptly to complaints or claims of defective roofing, to deliver goods quickly and on schedule, and a field representation program which offers technical advice and assistance to customers (Imbus, Tr. 255–56; Kingery, Tr. 741–43; Black, Tr. 1396, 1397–98, 1405; Linck, Tr. 1553; Waltz, Tr. 1679–80; Woodward, Tr. 1852).

100. Manufacturers of asphalt and tar roofing products ship on a freight equalized basis, *i.e.*, the customer pays no more in freight than it would cost from his nearest supplier even though he purchases from a more distant supplier. In other words, a customer pays only the freight from the closest available source of supply, regardless of the location of the shipping or producing plant, for his particular order. If a manufacturer ships a greater distance, that manufacturer absorbs the additional freight (Mulligan, Tr. 195; Manson, Tr. 920; Wehner, Tr. 1430). Therefore, a customer's freight charge is identical whether he purchases from a local manufacturer or from one many miles away.

101. The only industry witness questioned about it did not know what the discount policy of producers of wood shingles, slate, tile, or aluminum shingles was (Tinnell, Tr. 2228).

(5) Sensitivity to Price Changes

102. Price shifts by one manufacturer of asphalt and tar roofing products are readily communicated throughout the industry and result in an "evening up" of all manufacturers' prices within a short time (Black, Tr. 1396).

103. Customers are responsive to relatively small differences in price of products of asphalt and tar roofing manufacturers, and manufacturers will often offer to meet a lower bid by a competitor for a specific job (Imbus, Tr. 263; Mitzman, Tr. 342–43; Woooward, Tr. 1842–43). Increases in the price of asphalt and tar roofing products

do not precipitate immediate cost movements in, or demand shifts to, other roofing products, although they may cause customers to consider other products (Waltz, Tr. 1675–76). [27]

104. Dr. Lanzillotti, the economist called as a witness by JWC, testified that the price movements for asphalt and tar roofing products from 1970 to 1975 were affected by two overriding events: (1) imposition of federal price controls in 1971 and 1972; and (2) escalation of petroleum prices by the OPEC cartel in late 1973 (Lanzillotti, Tr. 2392). Respondent's exhibits disclose the lack of correlation between the prices of wood roofing products and asphalt roofing products during the period 1970–1975 (RX 84; RX 90; RX 91; Lanzillotti, Tr. 2393, 2573–74).

V. SECTION OF THE COUNTRY

105. Transportation costs are an important factor in determining the distance asphalt roofing products can profitably be shipped by a manufacturer (McMurry, Tr. 1239; Musser, Tr. 1651–52; Malarkey, Tr. 1961). Since producers of asphalt roofing products generally sell their products FOB seller's plant equalized to the nearest competitive producing or shipping point, they must usually absorb a portion of the transportation cost of shipments they make (Mulligan, Tr. 195; Finding 100). A producer located considerably farther away from a given area than other producers selling in that area cannot profitably sell in that location at a competitive price (Linck, Tr. 1569).

106. The distance a producer can profitably ship his product depends on a number of factors: the capacity and available supply of his plant, demand for his product, the type of transportation available and the amount of transportation charges which he must absorb. These factors vary according to the product sold, and change over time (Jenkins, Tr. 599; Kingery, Tr. 774–76; McMurry, Tr. 1239; Musser, Tr. 1651).

107. While industry witnesses agreed that they prefer to sell close to the plant, they gave estimates of the maximum distance they generally shipped or preferred to ship the bulk of their products which ranged from 250 miles to 600 miles (Jenkins, Tr. 599; Tennesson, Tr. 423; Mulligan, Tr. 196–97; Humphreys, Tr. 1977, 2006; Tinnell, Tr. 2220; *see* Kingery, Tr. 762–63, 780; RX 1). The President of Tamko Asphalt Products (Tamko) testified that a producer of asphalt roofing products should be able to ship at least 300 miles on a regular basis (Humphreys, Tr. 2005–06). [28]

108. Philip Carey/Panacon sold its roofing products only within the area in which it could make a profit (Musser, Tr. 1651). As a

general rule, it sold as much as possible within a 250 mile radius of its plants (Tennesson, Tr. 423; CX 14A).

109. All industry witnesses testified that they made some shipments on a regular basis to areas beyond their preferred maximum shipping distance. These shipments ranged up to 700 or 750 miles (Mulligan, Tr. 196–97; Tennesson, Tr. 423; Jenkins, Tr. 599; Kingery, Tr. 762–63; Humphreys, Tr. 2006; Tinnell, Tr. 2220). As stated by the President of Tamko:

> [Transportation] is a factor, but it is not the most critical factor. The most critical factor is to make the wheels turn.
>
> * * * * * * *
>
> Keep the plant running.

(Humphreys, Tr. 2006)

110. For example, Johns-Manville Corporation shipped about one third of the products it sold in the southern United States from its Waukegan, Illinois, plant, a distance of up to 750 miles. The products shipped were those which were not produced by Johns-Manville's southern plants (Kingery, Tr. 762–63, 782). Philip Carey/Panacon, likewise, made substantial shipments into Middle Atlantic and Southeastern states from its Lockland, Ohio, plant because it had no manufacturing facilities in those areas (Tennesson, Tr. 423). It had two large customers in that part of the United States, which the new Hopewell plant was intended to serve (Tennesson, Tr. 426; Finding 42).

111. Philip Carey/Panacon sold most of its asphalt roofing products east of the Mississippi River, within a 250 mile radius of its plants (Tennesson, Tr. 426; Musser, Tr. 1652). Within these areas it was in direct and substantial competition with Celotex (Tennesson, Tr. 428). The areas within 250 miles of both Philip Carey/Panacon and Celotex plants, and the overlap between them, extending from Texas to Maine, are shown on CX 14. Both Philip Carey/Panacon and Celotex made the bulk of their sales within the areas of overlap. In the 24 states and the District of Columbia, which are entirely or more than half encompassed within the overlapping circles shown on CX 14, the two companies made the following percentages of their sales of asphalt roofing products: [28]

	1970	*1971*	*1972*
Celotex	74.8	73.6	71.9
Philip Carey/Panacon	79.7	89.5	88.8
Panacon/Celotex			80.2

If two other states in which significant sales were made, South Carolina and Wisconsin, are included in the calculation, the percentages of sales are as follows:

Celotex	78.2	76.9	75.3
Philip Carey/Panacon	93.2	93.0	92.1
Panacon/Celotex			83.5

(Glassman, Tr. 1069A).

112. While there are a large number of asphalt roofing products manufacturers who sell and compete only on a local or regional basis (Mulligan, Tr. 208, 191–92; Humphreys, Tr. 2063; *see* CX 2; CX 3), the largest companies in the asphalt roofing industry sell throughout most or all of the United States (Mulligan, Tr. 191–92, 207; Jenkins, Tr. 581; Kingery, Tr. 739, 788; Conley, Tr. 2259–60; *see* CX 2; CX 3). Philip Carey/Panacon sold its products in a total of 42 states and the District of Columbia in 1971, including a limited amount of sales of some products on the West Coast (Tennesson, Tr. 442; Musser, Tr. 1952; CX 70, *in camera*). Celotex in 1971 sold its asphalt roofing products in 47 states and the District of Columbia (CX 70, *in camera*).

113. Dr. Lanzillotti testified that in his study of the roofing industry, he considered a nation-wide market because the firms making up the industry had plants throughout the United States and were shipping interregionally into broad areas of the country (Lanzillotti, Tr. 2309–10). He also testified that Philip Carey/Panacon and Celotex both competed in the national market, shipping products interregionally from their various plants, and competed with each other generally throughout the United States (Lanzillotti, Tr. 2478). [30]

114. The United States as a whole and that region of the country encompassing the 26 states and the District of Columbia which run northeast from Texas to Maine, in which both Philip Carey/Panacon and Celotex made the bulk of their sales of asphalt roofing materials (Finding 111), are appropriate sections of the country within which to assess the competitive effects of the acquisition challenged in this proceeding.

VI. INDUSTRY STRUCTURE

A. Industry Members and Production

115. According to an industry-wide survey conducted by the Commission, total domestic shipments of organic and inorganic based asphalt and tar roofing products for 1970, 1971, and 1972

amounted to $484.9 million, $680.9 million, and $765.4 million, respectively (CX 15A, B, C, *in camera*).

116. The industry shipment figures (as well as market share and concentration figures) for 1970, 1971, and 1972 were compiled from data submitted by each company listed in Finding 123 in response to a 6(b) Special Report survey authorized by the Commission on June 25, 1973 (*see* CX 69) and/or in response to supplementary requests made by Commission personnel (Glassman, Tr. 490). All information used to compile this survey was submitted in certified documentary form (Glassman, Tr. 1043–44). Initial uncertainties over the treatment to be accorded asbestos and fiberglass based materials and the inclusion of interplant transfers were clarified through follow-up inquiries and a stipulation with respondent (*see* CX 69; Tr. 234; Glassman, Tr. 490, 518–19). Questionnaires were sent to known producers of asphalt and tar roofing products and to any company identified as a competitor by those companies responding to the Special Report (Glassman, Tr. 490).

117. Value of shipments of imported asphalt and tar roofing products were not incorporated in the industry universe totals for 1970, 1971 and 1972 in view of evidence that imports represented at most 1 percent of the domestic market (Glassman, Tr. 956–58, 964, 966–67; *see also* Lanzillotti, Tr. 2525). It is not possible to determine from public sources the precise level of imports of asphalt and tar roofing products (*see* Lanzillotti, Tr. 2509–25; RX 76–79). [31]

118. In order to check the reliability of the data compiled from the 6(b) responses and supplementary responses, complaint counsel attempted to reconcile the 6(b) universe with figures derived from Bureau of Census data on 1972 value of shipments of the asphalt and tar roofing products covered by the 6(b) survey, and with an ARMA report on unit shipments by state in 1972 of certain categories of asphalt roofing products by 24 of its members (Glassman, Tr. 492, 969).

119. The size of the Census universe was $688.1 million in shipments and was constructed from the following SIC codes:

Product Code	*Product*	*Value*
2952311	Smooth-surface roll roofing	$50.5 million
2952313	Mineral-surface roll roofing	$44.0 million
2952314	Self-sealing strip shingles, 240 pounds or less	$388.1 million

2952315	Self-sealing strip shingles 245 pounds or more	$17.4 million
2952316	Regular strip shingles, 235 pounds or less	$57.8 million
2952317	Regular strip shingles, 245 pounds or more	
2952318	Individual shingles	$25.8 million
2952351	Asphalt saturated felts	$78.2 million
2952355	Tar saturated felts	$3.1 million
3292781	Asphalt or tar saturated asbestos felts	$23.2 million

(CX 12S; CX 13U; Glassman, Tr. 481–86, 1008–10, 1014, 1018).

[32] 120. The ARMA report covered the following categories or products: smooth-surface roll roofing, shingles, and asphalt and tar saturated felts. ARMA's Managing Director testified that the categories of products used in the 6(b) survey were generally comparable to the classifications used by ARMA in the survey of its members (CX 4A–B; Whittemore, Tr. 127–29, 131–32, 137–39).

121. There appear to be no sources of statistics on sales or shipments of asphalt and tar roofing products other than the 6(b) survey, the ARMA reports, and the Bureau of the Census data (Glassman, Tr. 1072; Whittemore, Tr. 129–30).

122. The 6(b) universe of shipments of asphalt and tar roofing products was the largest of those constructed from the three sources. The margin of error in the 6(b) universe as compared to the others varied from 2.7 percent to 10 percent (Glassman, Tr. 966, 969). The discrepancy may be attributable to the fact that the ARMA survey of its membership does not cover all industry firms, while it was not possible to isolate shipments of fiberglass based asphalt and tar roofing products from the Census data (Glassman, Tr. 1072–74).

123. According to the Commission's 6(b) survey, there were approximately 32 domestic manufacturers of asphalt and tar roofing products during the period 1970–1972. The following is an alphabetical listing of those companies which manufactured asphalt or tar saturated felts, asphalt roll roofings, and/or asphalt shingles during those years:

1. Allied Materials Corporation;
2. American Tar Company;
3. Arctic Roofing, Inc.;
4. Atlas Roofing Manufacturing Co., Inc. (subsidiary of Masonite Corp.);
5. Bear Brand Roofing, Inc.;
6. Big Chief Roofing Company;
7. Bird & Son, Inc.;
8. The Celotex Corporation;
9. Certain-teed Products Corporation (including B.F. Nelson Manufacturing Company, a one plant roofing operation in Minneapolis, acquired in December of 1970);
10. Congoleum-Nairn, Inc.;
11. Daingerfield Manufacturing Company (owned by the same principals who own Big Chief Roofing Co.);
12. Delta Roofing Mills, Inc.;
13. Elk Roofing Company;
14. Evans Products Corporation;
15. Fensky Felt & Wrapping Mills; [33]
16. The Flintkote Company;
17. Lloyd A. Fry Roofing Company;
18. GAF Corporation;
19. Globe Roofing Products Company, Inc.;
20. Johns-Manville Corporation;
21. The Koppers Company;
22. The Logan-Long Company;
23. Lunday-Thagard Oil Company;
24. Herbert Malarkey Roofing Company;
25. Nicolet Industries;
26. Owens-Corning Fiberglas Corporation;
27. Philip Carey Company (a division of Panacon before it was merged into Celotex in mid-1972);
28. Southern Asphalt Roofing Corporation;
29. Tamko Asphalt Products, Inc. (including its subsidiary Royal Brand Roofing, Inc.);
30. Tilo Company, Inc.;
31. United States Gypsum;
32. Volunteer Asphalt Company.

(RX 82, *in camera; see also* CX 2A–E; RX 99A; RX 99B)

B. Concentration

124. Four-firm and eight-firm concentration in the asphalt and

tar roofing industry was 50.98 percent and 82.21 percent in 1970; 51.76 percent and 82.78 percent in 1971; and 59.21 percent and 84.78 percent in 1972. During these same years Celotex and Philip Carey/Panacon, respectively, accounted for [*See In Camera* Findings] in 1970; [*See In Camera* Findings] in 1971; and [*See In Camera* Findings] combined for 1972 of all domestic shipments of asphalt and tar roofing products. As a result of the merger of Celotex, which ranked [*See In Camera* Findings] in 1971, and Philip Carey, which ranked [*See In Camera* Findings] in 1971, Celotex emerged in 1972 as the [*See In Camera* Findings] largest manufacturer in the industry (CX 15A, B, C, *in camera*). Analysis of these figures indicates that from an industry point of view, the subject acquisition contributed to an increase in 4-firm concentration of 7.45 percent and 8-firm concentration of 2 percent from 1971 to 1972. In addition, the figures disclosed that the industry had reached a level of concentration at which economic performance can be expected to deteriorate (Glassman, Tr. 502). (Note: The Commission may wish to remove the *in camera* protection accorded these market share percentages. Per Commission Rule 3.45, Orders according *in camera* treatment to testimony have set October 30, 1977, as the date by which the "age" of the information will call for such treatment to end.) [34]

125. The Celotex-Panacon merger was one of several recent horizontal acquisitions in the asphalt and tar roofing industry. Since 1969, there have been at least seven mergers between companies in the relevant line of commerce: Tamko's acquisition of Royal Brand; Big Chief's acquisition of Daingerfield; Celotex's acquisition of Panacon; Masonite-Atlas' acquisition of Southern; Certain-teed's acquisition of B.F. Nelson; Bird & Son's acquisition of Logan-Long and Flintkote's acquisition of U.S. Gypsum's plants in Jersey City and St. Paul (Whittemore, Tr. 121, 143–45; Jenkins, Tr. 579; Humphreys, Tr. 1976–77; Hogan, Tr. 2128; Finding 59).

C. Barriers to Entry

126. Full scale entry into the manufacture of asphalt and tar roofing products with roofing and felt capacity comparable to that of plants owned by the largest producers in the industry requires a substantial capital investment.

127. The Chairman of the Board of Directors of Bird & Son, Inc., a major competitor in the industry, estimated that the current cost of a roofing plant of the type that Bird & Son would build, with an annual capacity of 175,000 to 200,000 tons, would be $6 3/4 to $7 million. A felt mill was estimated to cost an additional $7.5 to $8 million (Jenkins, Tr. 575–76).

128. The Vice-President and Merchandise Manager for Asphalt and Fiberglass Roofing Products at Johns-Manville, another principal competitor in the industry, estimated on the basis of corporate studies that a combination roofing machine capable of producing fiberglass shingles, fiberglass roll roofing, organic shingles, organic roll roofing, and saturated felts would cost [*See In Camera* Findings]. He also estimated that a new dry felt mill could cost as much as [*See In Camera* Findings] (CX 71, *in camera;* Snow, Tr. 711–14, *in camera,* 1097–98, 1105–06).

129. The President of JWC testified that respondent spent $9 to $12 million in 1972–73 to construct its Goldsboro, North Carolina, plant (Cordell, Tr. 1232). [35]

130. However, entry into the industry can be made on a more modest scale with a significantly smaller investment (Hogan, Tr. 2127; Lanzillotti, Tr. 2424). In 1974, Tamko constructed a roofing plant using organic dry felt at Tuscaloosa, Alabama, for $2.4 million, of which part was obtained through an industrial revenue bond secured with the help of the Tuscaloosa Chamber of Commerce. In 1973, Tamko completed a second line at its felt mill at Joplin, Missouri, for $1.6 million (Hogan, Tr. 2127–28; Humphreys, Tr. 1987–89; Lanzillotti, Tr. 2424–25). In 1973, Consolidated Fiberglass Roofing Products entered the roofing market as a new competitor after building a fiberglass roofing plant for $1.8 million. It has plans to build its own fiberglass mat plant at an additional cost of $2 million. Herbert Malarkey Roofing Company has a fiberglass mat facility already under construction which will cost an estimated $1.5 million to place on stream (Malarkey, Tr. 1954; Conley, Tr. 2246, 2249, 2261–63, 2281).

131. Ownership of a felt producing facility is not essential to the manufacture of asphalt and tar roofing materials. A number of the smaller companies in the industry do not own felt mills (*see* CX 2; CX 3). Other manufacturers, not engaged in the roofing business, provide sources of supply for dry felt. There have been manufacturers of paper-type products with excess capacity which can fulfill requirements contracts to supply roofing felt. Indeed, had Philip Carey/Panacon built its Hopewell plant, it would have supplied the plant by use of requirements contracts rather than by constructing a felt mill (Tennesson, Tr. 468–69; Malarkey, Tr. 1948).

132. Neither patents nor technology are barriers to entry into the asphalt and tar roofing business. Celotex presently has no patented roofing products. Technical assistance is available from machinery and granule suppliers. Trained technical and sales personnel are available to new entrants offering attractive terms of employment

(Snow, Tr. 1131; Hasselbach, Tr. 1307, 1327–28, 1492, 1515–1518; Hogan, Tr. 2131–32; Conley, Tr. 2266). [36]

133. Advertising is not of great importance in the asphalt and tar roofing industry, and there is little brand name preference. Customers are available to new manufacturers charging competitive prices. A new firm wanting to enter would have distribution systems available to it through the established general line wholesalers, building material suppliers, contractors and mass merchandisers in the building products industry (Mulligan, Tr. 180; Hasselbach, Tr. 1329–30; Wehner, Tr. 1424–25; Waltz, Tr. 1662–63, 1670–74; Wolff, Tr. 1864–67, 1885–88). However, a representative of a major mass merchandiser indicated that his company prefers roofing suppliers with an established reputation for producing quality products, multi-plant operations, well-trained field representatives capable of providing expert assistance, and a solid financial basis (Black, Tr. 1387–88, 1397–98).

134. Small manufacturers of asphalt and tar roofing products have been successful in the marketplace. Tamko, for example, has grown to a three-plant operation through an acquisition and construction of a new plant, both in new marketing areas. Similarly, Bear Brand Roofing Company, a one-plant operation, has just completed plant improvements designed to increase its capacity by 30 percent. Its sales have doubled since 1967 and it has just experienced its best year in sales and profits. Big Chief Roofing Company and Herbert Malarkey Roofing Company, both of which are considered small, have been operating at capacity for the last three years (RX 83, *in camera;* Malarkey, Tr. 1947; Humphreys, Tr. 1976–78, 2014–16, *in camera;* Hogan, Tr. 2130; Tinnell, Tr. 2214–15).

135. In general, the dollar sales of asphalt and tar roofing products by the smaller companies grew during the period 1970 to 1972 at a greater rate than that of most of the larger companies (RX 83, *in camera*).

136. The largest firms in the asphalt and tar roofing materials industry own several roofing plants. In 1970–1972, the eight largest companies in terms of number of plants owned more than 70 percent of all United States asphalt and tar roofing plants (CX 68). Although multi-plant operations have certain competitive advantages, particularly in their ability to serve multiple-location customers (Tennesson, Tr. 429–30; Black, Tr. 1397), one-plant manufacturers of asphalt roofing products also have some competitive advantages over multi-plant companies, including the ability to provide better service. Company decisions can be made more quickly and customers can be given more personalized service. The overhead of one-plant opera-

tions generally is lower than that of multi-plant companies (Malarkey, Tr. 1961–1962; Hogan, Tr. 2134–2135; Conley, Tr. 2261). [37]

137. There have been several de novo entrants into the asphalt and tar roofing market in the past 15 years, including Herbert Malarkey Roofing Company (1960), Protective Papers Company (Nicolet) (1960), Big Chief Roofing Company (1961), Daingerfield Manufacturing Company (1962), Royal Brand Manufacturing Co. (1965), Evans Products Company (1970), Asphalt Products Industries, Inc. (1973), and Consolidated Fiberglass Products Company (1973) (RX 96; Whittemore, Tr. 123–24, 159; Malarkey, Tr. 1948–49; Hogan, Tr. 2127–28, 2131).

138. Asphalt Products Industries and Consolidated Fiberglass Products Company (Conglass) were not in existence in 1972. Asphalt Products operates on a very small scale (Malarkey, Tr. 1951). Conglass' sales in 1974 amounted to about [*See In Camera* Findings] of 1972 total sales of asphalt and tar roofing products, and 60 percent of those sales were made to retail outlets owned by one of the firm's shareholders (Conley, Tr. 2245–46, 2249–50, *in camera*, 2270). Of the remaining new entrants mentioned above, none, with the exception of Royal Brand, made as much as [*See In Camera* Findings] of the total national sales of asphalt and tar roofing products in 1972. The combined 1972 market share of all these companies, including Royal Brand, was [*See In Camera* Findings] (RX 82, *in camera*).

VII. COMPETITIVE EFFECTS

139. The acquisition of Panacon by Celotex intensified concentration in the already highly concentrated asphalt and tar roofing products industry (Finding 124), and contributed significantly to an industry-wide trend toward increased concentration (Finding 125).

140. Both Celotex and Panacon's Philip Carey division manufactured and shipped substantial quantities of asphalt and tar roofing products in 1970, 1971, and 1972, and both had substantial market shares in the national market in those years (CX 15A, B, C, *in camera*). Prior to their merger both companies were regarded as major competitors engaged in direct competition with one another (Imbus, Tr. 255–56; Jenkins, Tr. 580–81; Woodward, Tr. 1838, 1856–57; Hogan, Tr. 2128, 2144–45; Tinnell, Tr. 2215, 2231). According to the former President of Panacon, its Philip Carey division competed heavily and directly with Celotex in its principal marketing areas (Tennesson, Tr. 423–28). Philip Carey/Panacon was recognized as a vigorous competitor offering good service and a broad line of quality merchandise at competitive prices (Mulligan, Tr. 192–93; Imbus, Tr.

257–58; Mitzman, Tr. 340; Jenkins, Tr. 580–81; Morris, Tr. 839; Manson, Tr. 915; Wehner, Tr. 1431; Taylor, Tr. 1617; Musser, 1647–49; Waltz, Tr. 1671–74, 1679–81; Tinnell, Tr. 2231). The acquisition eliminated Philip Carey/Panacon as a substantial, competitive [38] force in the asphalt and tar roofing industry in national and regional markets.

141. Both Celotex and Philip Carey/Panacon shipped the bulk of their asphalt roofing products into the same geographic areas (CX 14A; CX 14B; CX 14C; Tennesson, Tr. 426–28; Glassman, Tr. 511–13, 984–85, 1069–A –71; Finding 111). Both firms actively solicited the accounts of such large mass merchandisers as Moore's Super Stores and Lowe's Companies, Inc. (Hasselbach, Tr. 1509–12). In 1970, Celotex furnished Lowe's with 40 percent of its requirements of asphalt shingles, while Philip Carey/Panacon supplied 30 percent. Celotex increased its share to 42 percent and Philip Carey/Panacon's portion declined slightly to 27 percent during 1971. After the Celotex-Panacon merger, Celotex's share of the Lowe's shingles account was 59 percent in 1972, 58 percent in 1973, 57 percent in 1974 and 47 percent in 1975 (Black, Tr. 1393-94, 1398-99, 1402).

142. Between 1970 and 1972, Philip Carey/Panacon and Celotex competed for individual accounts—distributors and roofing contractors—over a wide area. For example, Philip Carey/Panacon accounted for 35 percent to 55 percent of Bergen-Hudson asphalt and tar roofing supplies for northern New Jersey, while Celotex's share of this distributor's roofing requirements ranged from 3 percent to 9 percent (Mitzman, Tr. 340). Roofing contractors from Kansas City, Missouri, and Dayton, Ohio, described the direct competition between Celotex and Philip Carey/Panacon in their areas. In the two years preceding the Panacon acquisition, contractors from both of these areas were purchasing asphalt or tar roofing products from Philip Carey/Panacon and Celotex. One split 70 percent of his roofing purchases evenly between Philip Carey/Panacon and Celotex. Today Celotex alone supplies more than 75 percent of that contractor's asphalt or tar roofing requirements (Manson, Tr. 915–16; Wehner, Tr. 1427–28).

143. Whether viewed in terms of national market shares and concentration ratios, regional marketing areas, or individual accounts, the acquisition of Panacon by Celotex resulted in a substantial lessening of competition in the asphalt and tar roofing industry by increasing four and eight-firm concentration, increasing Celotex's national market share, and eliminating Philip Carey/Panacon as a substantial, independent competitive force.

DISCUSSION

RESPONDENT'S MOTION TO DISMISS

At the conclusion of the case-in-chief, counsel for JWC orally moved for dismissal of the complaint (Tr. 1152). His grounds were (1) that there had been a failure to prove a violation of Section 7 of the Clayton Act (15 U.S.C. 18) (Tr. 1152), (2) that the Commission lacks jurisdiction because Celotex, which effected the acquisition of Panacon, was not charged with the violation, and (3) that JWC is not engaged "in commerce" as that term is used in Section 7 (Tr. 1153). Counsel for JWC argues these points again in his post-hearings Brief (Respondent's Brief, pp. 22–28, 6–8).

Oral argument by counsel for each side was heard on the motion on December 1, 1975. At the start of the oral argument, counsel for JWC submitted "Respondent's Memorandum in Support of Motion to Dismiss the Complaint." At the end of the oral argument the parties were advised that in accordance with Commission Rule 3.22(e) the ruling on the motion would be deferred until the close of the case for the reception of evidence (Tr. 1197–1198). Subsequently, complaint counsel submitted an answering memorandum in opposition to the "Memorandum in Support . . .," *supra.* At the conclusion of the case-in-defense on January 21, 1976, respondent's motion was denied (Tr. 2662); however, some discussion as to why it was denied is appropriate.

The evidence offered by complaint counsel was weighed in the light of the rule set forth in 6 J. Moore, *Fed. Prac.*, ¶56.15(3) at 2,336 (2d Ed. 1974). The rule, in summary, is that all inferences are drawn against the movant, in favor of the party opposing the motion to dismiss, that the movants must make a strongly persuasive showing that it is quite clear what the truth is and that there is no real doubt as to any material fact. Here, at the conclusion of the case-in-chief, the most obviously material fact yet to be established or *finally* resolved was whether the effect of the acquisition of Panacon might be *substantially* to lessen competition. [40]

The evidence introduced in the course of the case-in-chief established *prima facie,* that a violation of Section 7 of the Clayton Act occurred when Panacon was acquired. There was ample evidence showing (1) that Panacon, a corporation, was engaged in interstate commerce in lines of commerce identified with the asphalt and tar roofing industry in various sections of the United States, (2) that JWC, a corporation, and its subsidiary Celotex, also a corporation, were engaged in interstate commerce in a number of the same

sections of the country, and (3) that Panacon and Celotex were engaged in the same lines of commerce (CX 23, 29F, 35B, 35E, 35I).

Other evidence showed that prior to this "horizontal" acquisition, the asphalt and tar roofing industry was concentrated (CX 15 - *In Camera*) and that Celotex believed that it ranked fourth or fifth (CX 33D) in the manufacture of asphalt roofing products and that after the acquisition Celotex believed that it ranked second (CX 35E); hence, at the end of the case-in-chief the evidence showed that the preacquisition competition between Panacon and Celotex may have been substantial. Complaint counsel's evidence also established that neither Panacon, JWC, nor Celotex was in financial straits (CX 35).

The evidence clearly was enough at the least to raise presumptions of fact upon which a decision on the motion to dismiss could be based and was sufficient to establish facts suggesting that a violation of Section 7 of the Clayton Act occurred when the acquisition took place. *Cf. Otis & Co.* v. *Securities & Exchange Commission,* 176 F.2d 34, 42 (D.C. Cir. 1949), *reversed on other grounds,* 338 U.S. 843 (1949). *Also see U.S.* v. *Philadelphia National Bank,* 374 U.S. 321, 362–367 (1963). Certainly, the evidence adduced at the hearings on the case-in-chief ". . . was sufficiently strong for the opponent [respondent JWC] to be called upon to answer it. A *prima facie* case . . ., is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced on the other side." "Prima Facie Case," definition, *Black's Law Dictionary,* Third Edition, p. 1414.

NAMING JWC AND NOT CELOTEX AS THE RESPONDENT

From the answer to the complaint and the evidence in the record it is established that (1) JWC properly was named as the respondent, (2) Celotex, which acquired Panacon in April 1972, is one of many wholly-owned corporate subsidiaries of JWC, and (3) Panacon was merged into Celotex on June 30, 1972 (Findings 5, 63). [41]

Mr. Jim Walter, Chairman of the Board of JWC, and Mr. Joe B. Cordell, a Senior Vice-President, Treasurer and a Director of JWC, had assumed offices on the board of Panacon at the time of the acquisition in April 1972 (Finding 60). JWC advanced the money Celotex paid to Glen Alden Corporation for the Panacon stock (Finding 59). In addition, Messrs. Walter and Cordell held offices on the boards of both JWC and Celotex (Finding 30). As of December 1975, Mr. Herbert, a Vice-President of JWC, had been President of Celotex since January 1972, Mr. Hegerich had been a Vice-President of both JWC and Celotex for more than five years, and Mr. Matlock had been Vice-President and Treasurer of JWC since 1974 and Vice-President of Celotex since 1969 (CX 37–0).

The evidence shows that officials of JWC oversee JWC's operations in various States and Canada, including those of Celotex and other subsidiary corporations as well (Finding 11). It also is clear that JWC and Panacon consider JWC and Celotex to be coextensively responsible for the acquisition and for subsequent actions taken regarding Panacon (Finding 65).

When the pattern and framework of the whole enterprise are taken into consideration (*see Art National Manufacturers Distributing Co.* v. *Federal Trade Commission,* 298 F.2d 476, 477 (2d Cir. 1962), *cert. denied,* 370 U.S. 939 (1962)), it is clear that naming JWC as the respondent in this matter is proper. The evidence is persuasive that Celotex and JWC were alter egos in many respects and that JWC is the corporation which played the dominant role in the acquisition.

Even without the control and substantial identity indicated, the Commission has held that the parent is liable for its subsidiaries' acts ". . . if the facts demonstrate even latent control." *See In the Matter of Beneficial Corporation and Beneficial Management Corporation,* Dkt. 8922, p. 3 [86 F.T.C. 119 at 159], Commission Opinion, slip copy, dated July 15, 1975:

> [W]here a parent possesses latent power, through interlocking directorates, for example, to direct the policy of its subsidiary, where it knows of and tacitly approves the use by its subsidiary of deceptive practices in commerce, and where it fails to exercise its influence to curb illegal trade practices, active participation by it in the affairs of the subsidiary need not be proved to hold the parent vicariously responsible. Under these circumstances, complicity will be presumed.

[42] *P. F. Collier & Son Corp., et al.* v. *Federal Trade Commission,* 427 F.2d 261, 270 (6th Cir. 1970), *cert. denied* , 400 U.S. 926 (1970).

The following also is found in the *Collier* opinion:

> . . . where stock ownership is resorted to for the purpose of controlling a subsidiary so that it may be used as "a mere agency or instrumentality" of the parent
>
> > "the courts will not permit themselves to be blinded or deceived by mere forms or [sic] law but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require." *Chicago, Milwaukee & St. Paul Railway Company* v. *Minneapolis Civic and Commerce Association,* 247 U.S. 490, 501, 38 S.Ct. 553, 557, 62 L.Ed. 1229 (1918). (427 F.2d 266–267)

On page three in the *Beneficial* opinion, the Commission specifically disavowed the common law rule for which counsel for JWC argued in his motion to dismiss by stating that it rejected any such stringent standard. The no longer apt rule regarding the ignoring of separate corporate identities was restated in *National Lead Co.* v.

Federal Trade Commission, 227 F.2d 825, 829 (7th Cir. 1955), *rev'd on other grounds,* 352 U.S. 419 (1957):

> . . . there must be evidence of such complete control of the subsidiary by the parent as to render the former a mere tool of the latter, and to compel the conclusion that the corporate identity of the subsidiary is a mere fiction.

Press Co., Inc. v. *N.L.R.B.,* 118 F.2d 937, 946–947 (D.C. Cir. 1940), *cert. denied,* 313 U.S. 595 (1941).

As noted previously, the more recent precedent holds that ". . . even latent control" (*Beneficial Corporation et al., supra*) warrants holding the parent liable for its subsidiary's acts.

Where the public interest is involved, as it is in the enforcement of both Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act, a strict adherence to common law principles is not required in the determination of whether a parent should be held for the acts of its subsidiary, where strict adherence would enable the corporate device to be used to circumvent the [43] policy of the statute. *Joseph A. Kaplan & Sons, Inc.* v. *Federal Trade Commission,* 121 U.S. App. D.C. 1, 347 F.2d 785, 787 n.4 (1959).

The fact that the *Beneficial, Kaplan,* and *Collier* decisions cited above were brought under Section 5 of the Federal Trade Commission Act makes them no less persuasive for holding that JWC is properly charged in the complaint for acquiring Panacon, in violation of Section 7 of the Clayton Act because Section 5 is the basic statutory authority under which the Commission functions. Its statutory authority to enforce the Clayton Act is contained in Section 11 thereof (15 U.S.C. 21).

Moreover, the Commission has specifically held that an acquisition through a subsidiary is to be deemed the acquisition of the parent for purposes of Section 7. For example, in *Permanente Cement Co.,* 65 F.T.C. 410 (1964), the Commission said:

> The acquisition was actually made by respondent Glacier, a wholly owned subsidiary of Permanente. . . . Since Permanente and Glacier were (and are) under common ownership and management, we deem Permanente, rather than Glacier, the acquiring firm (*cf. Bowater S.S. Co.* v. *Patterson,* 303 F.2d 369, 372–373 (2d Cir. (1962))—although it makes little practical difference whether Permanente or Glacier be deemed the acquiring firm, Permanente's relationship to RMC [the acquiring company] is the critical factor in assessing the lawfulness of the acquisition. *Id.* at 492 n.7.

In view of the foregoing, it was proper to name only JWC as the respondent. Lastly, had it been necessary to add Celotex as a respondent, or had complaint counsel so requested, the Commission has held that it is within the authority of an administrative law

judge to amend the complaint to add a respondent. *See* "Order Affirming Hearing Examiner's Order Amending Complaint," in *The Goodyear Tire and Rubber Company,* Dkt. 6486, 53 F.T.C. 1263, October 26, 1956, as described in "Interlocutory Order Remanding Motion to Amend Complaint for Determination of the Hearing Examiner," in *Capitol Records Distributing Corporation,* Dkt. 8029, 58 F.T.C 1170, 1173 n.5, March 1, 1961. [44]

IS JWC "IN COMMERCE"?

The evidence establishes that JWC is "in commerce" as that term is defined in Section 7 of the Clayton Act, and that it is subject to the Commission's jurisdiction under Section 11. Section 7 provides that both the acquiring and the acquired corporation, must have been engaged in commerce when the challenged acquisition occurred. Counsel for JWC argues, in effect that since JWC is a holding company (Respondent's Proposed Finding II., A., 2.), the excerpt quoted below from the relatively recent decision of the Supreme Court in *United States* v. *American Building Maintenance Industries,* 422 U.S. 271 (1975), supports his position that JWC was not "in commerce" because, in his view, JWC directly does not produce, distribute or acquire goods or services. The quote follows:

> To be engaged "in commerce" within the meaning of Section 7, a corporation must itself be directly engaged in the production, distribution, or acquisition of goods or services in interstate commerce. *See Gulf Oil Corp.* v. *Copp Paving Co.,* 419 U.S. at 195. (at 283)

If the view of counsel for JWC were adopted, no holding company not "directly engaged in the production, distribution or acquisition of goods or services . . ." etc., in a very literal sense, would be chargeable with a violation of Section 7. Such a result would stand Section 7 on its head because the restraints on trade worked by holding companies in the form of trusts were the genesis of the Sherman Antitrust Act (15 U.S.C. 1-7), *Standard Oil Co. of New Jersey* v. *United States,* 221 U.S. 1, 50 (1911), and the Federal Trade Commission and Clayton Acts were passed to supplement the Sherman Act. *See* the "Report of the Attorney General's National Committee to Study the Antitrust Laws," 1955, p. 1; *cf. Arrow-Hart & Hegeman Electric Co.* v. *Federal Trade Commission,* 291 U.S. 587, 595 (1934); *United States* v. *Celanese Corporation of America,* 91 F. Supp. 14, 17 (D.C.S.D. N.Y. 1950). [45]

In fact, the evidence is persuasive and establishes that JWC, as a holding company, *is* engaged in the "production, distribution or acquisition of goods or services in interstate commerce" within the

purview of the quoted language from the *American Building Maintenance* opinion. This, because although the headquarters of JWC is in Tampa, Florida, Mr. Jim Walter, Chairman of the Board, Mr. J. B. Cordell, Senior Vice-President, Treasurer and Director of JWC, Mr. William H. Frack, Jr., a Vice-President and other JWC executives participated in the negotiations in New York (Finding 12) looking toward the acquisition of Panacon and, at other times, other acquisitions as well (Finding 8); hence, in the acquisition of Panacon, they as officers of JWC and JWC itself were engaged in the acquisition of a "good" (a corporation) peculiar to the operations of a holding company. Also, JWC borrowed the money from various banks (*i.e.*, obtained credit, a form of good or service per *Fortner Enterprises, Inc.* v. *U.S. Steel Corp.*, 394 U.S. 495, 508-509 (6th Cir. 1969)) which was furnished to Celotex to make the purchase (Finding 59); hence, JWC distributed a "good" (the money—a tangible commodity, *Fortner, supra*, 394 U.S. at 508) used to buy Panacon stock.

The evidence also shows that JWC has loan agreements with banks in Chicago, New York, Detroit and Cleveland and that JWC has purchased and sold companies throughout the United States. Further, courts have consistently held that the issuance and sale of securities, as JWC has done (Finding 14), on public exchanges are transactions in interstate commerce, *e.g.*, *Parry* v. *Bache*, 125 F.2d 493, 495 (5th Cir. 1942); *Oklahoma-Texas Trust* v. *Securities and Exchange Commission*, 100 F.2d 888 (10th Cir. 1939).

Officials of JWC oversee the activities of the various corporations which it owns. This oversight inevitably calls for direct engagement across State boundaries in managing the firm's assets because those activities take place in many different states (Findings 7, 9, 11). JWC's interstate activities are, in fact, similar in certain respects to those of insurance companies which have been held to be in interstate commerce in a Sherman Act case as the following quote indicates: [46]

> "Interrelationship, interdependence, and integration of activities in all the states in which they operate are practical aspects of the insurance companies' methods of doing business." There is ". . . a continuous and indivisible stream of intercourse among the states . . . which are essential to the negotiation and execution of policy contracts. . . . The decisions which that company makes at its home office—the risks it insures, the premiums it charges, the investments it makes, the losses it pays—concern not just the people of the state where the home office happens to be located. They concern people living far beyond the boundaries of the state."

United States v. *South-Eastern Underwriters Association et al.*, 322 U.S. 533, 541–42 (1944). In similar fashion, JWC does many of these

same things in relation to its subsidiaries. Even though JWC does not concern itself with "policy contracts," the decisions made in Tampa do concern operations and employees far beyond the boundaries of Florida.

As the Court noted in the *American Building Maintenance* decision, *supra*, 422 U.S. at 282, the Commission's view is ". . . that § 7 applies only to an acquisition in which both the acquired and the acquiring companies are engaged directly in interstate commerce. *E.g., Foremost Dairies, Inc.*, 60 F.T.C. 944, 1068–1069 [1962]. *Beatrice Foods Co.*, 67 F.T.C. 473, 730–731 [1965]; *Mississippi River Fuel Corp.*, 75 F.T.C. 813, 918 [1969]." [Note: The literal language in the *Foremost* opinion cited reflects that importation "of commodities" is the "indispensable" element to establish the existence of interstate commerce; however, this language does not sufficiently express the concept that other elements of trade between states also are adequate to show the existence of interstate commerce.]

The evidence here establishes that JWC, Celotex, and Panacon all were engaged directly "in commerce" as that term is used in Section 7 of the Clayton Act (Findings 10, 22, 45). [47]

ELEMENTS OF SECTION 7 OF THE CLAYTON ACT

Section 7 (15 U.S.C. 18) provides that no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where in any line of commerce (the product market), in any section of the country (the geographic market), the effect of the acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Both JWC and Panacon were corporations engaged in commerce (Findings 10, 45). That having been established, "determination of the relevant product and geographic market is 'a necessary predicate' to deciding whether a merger contravenes the Clayton Act." *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602 (1974); *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 324 (1962); *United States* v. *E. I. du Pont de Nemours & Co. et al.*, 353 U.S. 586, 593 (1957).

1. The Product Market

Identification of the dimensions of the product market within which the legality of an acquisition is to be tested is the first step in every Section 7 case. *Brown Shoe Co., supra*, 370 U.S. at 324. In *Brown Shoe*, the Supreme Court said that while there may be broad

product markets whose outer boundaries "are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it . . .," there also may be "well defined submarkets" within the broader market which in themselves constitute product markets for antitrust purposes. There, men's, women's and children's shoes were held to be economically significant submarkets within the shoe industry. 370 U.S. at 325.

The Court in *Brown Shoe* described seven factors which led it to distinguish the submarkets:

> industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors . . . .

370 U.S. at 325.

[48] In *United States* v. *Aluminum Co. of America* (Alcoa-Rome), 377 U.S. 271 (1964), separate aluminum and copper submarkets were found to exist in the wire and cable industry, and existence of a separate paper insulated power cable submarket was found in *United States* v. *Kennecott Copper Corp.* (Kennecott), 231 F. Supp. 95, 98–100 (S.D. N.Y. 1964), *aff'd per curiam,* 381 U.S. 414 (1965). Previously, in *United States* v. *Bethlehem Steel Corp.,* 168 F. Supp. 576, 593–95 (S.D. N.Y. 1958), the iron and steel industry was found to be the broad line of commerce but ten specific products (*e.g.,* hot rolled sheets, track spikes, electricweld pipe, oil field equipment and supplies) were held to comprise identifiable submarkets as well.

Decisions such as *Alcoa-Rome, Kennecott,* and others which came after *Brown Shoe,* made it clear that not all or even most of the seven factors need to be present before a valid submarket for Section 7 purposes may be found to exist. *United States* v. *Phillipsburg National Bank & Trust Co.,* 399 U.S. 350, 359–60 (1970); *United States* v. *Continental Can Co.* (Continental Can), 378 U.S. 441, 456–57 (1964); *General Foods Corp.* v. *Federal Trade Commission,* 386 F.2d 936, 941 (3d Cir. 1967); *Columbia Broadcasting System, Inc.* v. *Federal Trade Commission,* 414 F.2d 974, 979 (7th Cir. 1969), *cert. denied,* 397 U.S. 907 (1970).

Counsel for JWC argues that *only* the broad market, "roofing products" is the relevant line of commerce and that it includes such products which are made of wood, clay, cement, metal, asbestos and other materials as well as asphalt and tar (Respondent's Brief, p. 9). Although I do not agree with the position of counsel for JWC, there is no question but that in an appropriate case "roofing products" might be examined as the relevant line of commerce. *See Continental Can,*

supra, 378 U.S. at 457–58. But this case is not appropriate for such an examination as is explained below.

The evidence here shows that asphalt and tar roofing products are recognized by the roofing industry as being separate and distinct, in that there is an association of which both Celotex and Philip Carey/Panacon were members which is limited to the domestic producers of such roofing products (Findings 81–82). The evidence also shows that producers of asphalt and tar roofing products consider other such producers to be their competitors (Finding 86). Asphalt and tar roofing products have [49] peculiar characteristics due to their composition and performance qualities, including fire resistance, versatility, relatively low price, and they are sensitive to changes in the price of such products (Findings 87–93, 102). Asphalt and tar roofing products are made on machinery which is different from that used to make other roofing products, and they usually are made by producers who concentrate on such products (Findings 96–97). In addition, the technical expertise and capabilities called for in the production of asphalt and tar roofing products are unique when compared with the production of other roofing industry materials such as clay tiles, wood shingles or shakes, sheet metal and the like (Finding 96).

In view of the foregoing factors, it is clear that the asphalt and tar roofing products market is "sufficiently inclusive to be meaningful in terms of trade realities." *Crown Zellerbach Corporation* v. *Federal Trade Commission*, 296 F.2d 800, 811 (9th Cir. 1961). Hence, it is proper to consider asphalt and tar roofing products as the relevant line of commerce in connection with determining whether the acquisition of Panacon by Celotex violated Section 7.

2. The Geographic Market

The section of the country or geographic market at which one must look in order to determine whether an acquisition has substantially lessened competition may be identified in much the same way as the product market. Thus, in *Brown Shoe, supra*, 370 U.S. at 336–37, the Supreme Court said that the "criteria to be used in determining the appropriate geographic market are essentially similar to those used to determine the relevant product market. . . . The geographic market selected must . . . both correspond to the commercial realities of the industry and be economically significant. . . . [A]lthough the geographic market in some instances may encompass the entire Nation, in some other circumstances, it may be as small as a single metropolitan area."

What is clear from the precedents is that the section of the country

to be examined need not be marked off in metes and bounds. *United States* v. *Pabst Brewing Co.*, 384 U.S. 546, 549 (1966); *E. I. du Pont & Co., supra*, 351 U.S. at 395. In this connection, in *Philadelphia National Bank, supra*, 374 U.S. at 360 n.37, the Supreme Court said:

[50] . . . there is still some artificiality in deeming the four county area the relevant "section of the country" so far as businessmen located near the perimeter are concerned. But such fuzziness would seem inherent in any attempt to delineate the relevant geographical market.

Also see United States v. *Connecticut National Bank*, 418 U.S. 656, 669–70 (1974), where the Court said that it is the Government's role to come forward with evidence "delineating the rough approximation of localized banking markets mandated by *Philadelphia Bank, supra*, and *Phillipsburg National Bank, supra*."

The effects of an acquisition have been considered by the Supreme and lower Courts with reference to both broad geographic markets and submarkets within the broad area, in basically the same manner as in the case of product markets. *United States* v. *Kimberly-Clark Corp.*, 264 F. Supp. 439, 455–56 (N.D. Cal. 1967); *United States* v. *Bethlehem Steel Corp., supra*, 168 F. Supp. at 601–02.

In *Philadelphia National Bank, supra*, 374 U.S. at 358–61, commercial and economic factors were used in identifying the relevant geographic market. The Court said that "the factor of inconvenience localizes banking competition as effectively as high transportation costs in other industries," that "the vast bulk of appellees' business originates in the four-county area," and that federal banking agencies had recognized a comparable "area of effective competition"; consequently, "the four-county area in which appellees' offices are located . . ." was the appropriate section of the country. This, even though that description did not "delineate with perfect accuracy." At 360–61.

In a more recent case where potential rather than horizontal competition was involved, the Supreme Court held that "without exception the Court has treated 'section of the country' and 'relevant geographic market' as identical, and it has defined the latter concept as the area in which the goods or services at issue are marketed to a significant degree by the acquired firm." *Marine Bancorporation, supra*, 418 U.S. at 602. In commenting on the "section of the country" holding of the Court in *Pabst Brewing, supra*, 384 U.S. at 550–51, the Court said in *Marine Bancorporation* in footnote 20:

[51] Some of the Court's language in *Pabst* suggests that the Government may challenge a merger under § 7 without establishing any relevant geographic market. . . . But Pabst in reality held that the Government had established three

relevant markets in which the acquired firm actually marketed its products—a single State, a multistate area, and the Nation as a whole. . . . And in that case the acquiring firm was an actual competitor of the acquired firm in all three relevant geographic markets. . . . Thus while *Pabst* stands for the proposition that there may be more than one relevant geographic market, it did not abandon the traditional view that for purposes of § 7 "section of the country" means "relevant geographic market" and the latter concept means the area in which the relevant product is in fact marketed by the acquired firm.

On the basis of the economic and commercial facts in the record, both the United States as a whole and those regional areas of the United States in which Philip Carey/Panacon and Celotex competed, properly may be examined as the relevant sections of the country for Section 7 purposes.

In 1971, both Celotex and Philip Carey/Panacon sold asphalt and tar roofing products in 47 and 42 states, respectively (Finding 112). Asphalt and tar roofing products are distributed nationally and the major firms compete with others throughout the United States (Findings 112–113). These facts warrant considering the nation as a whole as a relevant geographic market. *See* Commission Opinion in *Beatrice Foods Co.,* Dkt. 8864, p. 8 [86 F.T.C. 1 at 59], slip copy (July 1, 1975).

Even though Philip Carey/Panacon and Celotex did not actually sell their asphalt and tar roofing products in every state, there are numerous precedents to the effect that a national market may be considered along with regional markets. *See Federal Trade Commission* v. *Procter and Gamble Co.,* 386 U.S. 568, 571–72 (1971); *Pabst, supra,* 384 U.S. at 549–551; *A. G. Spalding & Bros., Inc.* v. *Federal Trade Commission,* 301 F.2d 585, 607 (3rd Cir. 1962); *Kimberly-Clark, supra,* 264 F. Supp. at 454–458; Commission decision in *British Oxygen Company Limited, et al.,* Dkt. 8955, pp. 8–9 [86 F.T.C. 1241 at 1346–7], slip copy (December 8, 1975). [52]

In *Kennecott Copper Corp.,* Dkt. 8765, 78 F.T.C. 744 at 917–18 (May 5, 1971), the Commission said that a national market existed for coal even though the acquired firm (Peabody Coal Company) sold principally in the North and South Central States and there was no evidence of sales in the Northeast, Mid-Atlantic or Northwestern States, *affirmed,* 467 F.2d 67 (10th Cir. 1972), *cert. denied,* 416 U.S. 909 (1974), *rehearing denied,* 416 U.S. 963 (1974). *Also see United States* v. *Jos. Schlitz Brewing Company,* 253 F. Supp. 129 at 134–35 N.D. Cal. 1966).

Complaint counsel state that only the United States as a whole is the relevant geographic market (Complaint Counsel Brief, p. 33), and the economist who testified at the instance of JWC used the entire United States as the geographic market in evaluating the data on

which he based his testimony. But this is not a case in which neither party has suggested that anything less than the nation should be considered the proper geographic market. *See* Opinion of the Commission, *The Budd Company,* Dkt. 8848, p. 5 [86 F.T.C. 518 at 572], slip copy, August 29, 1975. In fact, counsel for JWC has suggested that the industry is one of regional markets only (Respondent's Brief, p. 20).

One of complaint counsel's exhibits (CX 14) shows that Philip Carey/Panacon and Celotex had plants in a number of regions stretching northeasterly from Texas to Maine which were so located that competition existed between them to a significant degree in the production and sale of asphalt and tar roofing products. Merely by examining the map showing a 250 mile radius from various of these plant sites (CX 14), it is obvious that there was substantial overlap of the areas where Philip Carey/Panacon and Celotex did much of their business. The area of overlap is that in which Carey marketed most of the asphalt and tar roofing products which it produced. It also is a section of the country in which Celotex, prior to the acquisition, marketed much of the asphalt and tar roofing products which *it* produced (Finding 111).

Since freight rates were a significant factor in determining where Philip Carey/Panacon would make a competitive effort (Findings 105, 108), it is reasonable to use the 250 mile radius in identifying those areas in which it and Celotex sold the bulk of their asphalt and tar roofing products. There is conflicting testimony as to whether a 250 mile or greater distance for shipments [53] of asphalt and tar roofing products is a generally acceptable "rule of thumb" in the industry (Finding 107). Nonetheless, the 250-mile figure has enough acceptance that there is no real problem in using it in reaching the determination that a "belt" running from Texas to Maine also is a relevant geographic market. The Supreme Court has accepted the similarly imprecise "southeastern part of the United States" as the relevant section of the country, *United States* v. *Penn-Olin Chemical Co.,* 378 U.S. 158, 161 (1964), and a lower court found that the "freight rates for shipping beer across the Continental Divide strongly support the conclusion that the Eight Western States area is a relevant section of the country," as was the State of California, in *Schlitz Brewing, supra,* 253 F. Supp. at 146.

Lastly, the competitive realities are that this Texas to Maine "belt" *is* significant economically because it is the area where "the effect of the merger on competition will be direct and immediate . . ." which the Supreme Court has held is an appropriate "section of the country" insofar as Section 7 of the Clayton Act is concerned.

Philadelphia National Bank, supra, 374 U.S. at 357. Certainly, it is the area in which customers of Panacon were obliged to look for an alternative source of supply after the acquisition. *See Permanente Cement, supra,* 65 F.T.C. at 489.

Consequently, and as is alleged in the complaint (par. 15), it is proper to consider both the United States as a whole and the "belt" running from Texas to Maine as relevant sections of the country. Even though the record does not contain precise data as to the market shares of Philip Carey/Panacon and Celotex in the "belt" states, the conclusion is inescapable that those shares were significant because (1) that is the area in which each of them operated the bulk of their plants and made substantial sales (Finding 111), and (2) they were among the industry leaders in national market shares just prior to the acquisition (Finding 124). [54]

3. Market Concentration

The Congress made it clear that its primary concern when the Clayton Act was amended was to forestall, insofar as possible, reductions in competition in all lines of commerce by keeping a large number of small competitors in business. *United States* v. *Von's Grocery Co.,* 384 U.S. 270, 275 (1966). More recently, the Supreme Court in *Philadelphia National Bank, supra,* 374 U.S. at 363, as quoted in *United States* v. *General Dynamics Corp.,* 415 U.S. 486 at 497 (1973), said:

> This intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.

According to the Commission survey of the members of the asphalt and tar roofing industry pursuant to Section 6(b) of the Federal Trade Commision Act (15 U.S.C. 46) (CX 15A, B, C, *in camera*), 4-firm and 8-firm concentration was significant (Finding 124). Both Panacon and Celotex enjoyed market shares which resulted in their being included in the 4-firm category after the acquisition (Finding 124).

Counsel for Jim Walter questioned the results of the survey; however, it does provide a reliable indication of the asphalt and tar roofing products industry because of its extensive coverage of such producers. Even though it may be possible to point to technical flaws

in the compilation of industry statistics, the Supreme Court has held that "precision in detail is less important than the accuracy of the broad picture presented." *Brown Shoe, supra,* 370 U.S. at 342 n.69. The Commission also has said that there is no requirement that the exact size of a market need be shown in a Section 7 case. [55] *Papercraft Corp.,* Dkt. 8779, 78 F.T.C. 1352, 1405–06 (1971), *modified and affirmed,* 472 F.2d 927 (7th Cir. 1973). The Section 6(b) survey conducted in connection with this case accurately presented the "picture" of the asphalt and tar roofing products industry.

Other evidence of a trend toward concentration is found in the fact that since 1969 there have been six mergers between competitors in the industry other than that between Panacon and Celotex (Finding 125). The trend was furthered when Celotex acquired Panacon, and in the opinion of the economist called at the instance of complaint counsel, the industry had reached a level of concentration at which economic performance frequently deteriorates (Finding 124).

In *Stanley Works* v. *Federal Trade Commission,* 469 F.2d 498, 504 (2d Cir. 1972), *cert. denied,* 412 U.S. 928 (1973), the court said that the cabinet hardware industry was concentrated because the 4-firm percentage of market was 49 percent to 51 percent. To the same effect, in *Industrial Organization,* Professor Joe Bain says that a market in which the 4-firm percentage is 50 percent, as here, reflects high-moderate concentration (p. 131, 2d ed. 1968) (Finding 124).

It is also worthy of note that the merger in this proceeding falls within the class of horizontal mergers subject to challenge under the Department of Justice Merger Guidelines. *Trade Reg. Rep.,* par. 4510.

This case falls squarely within the principle that where there has been a "history of tendency toward concentration in the industry," tendencies toward further concentration "are to be curbed in their incipiency." *Continental Can, supra,* 378 U.S. at 461, citing *Brown Shoe, supra,* 370 U.S. at 345–46. Where "concentration is already great the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." *Philadelphia National Bank, supra,* 374 U.S. at 365 n.42.

Lastly, it is worthy of mention that the Supreme Court has made clear that Section 7 can be violated in ways that do not necessarily increase concentration in the relevant market. Both potential entry and vertical acquisition cases have so held. *See* Commission decision in *British Oxygen, supra,* p. 30 [86 F.T.C. 1241 at 1265], slip copy. [56]

4. Ease of Entry

Counsel for JWC introduced evidence to show that there are no significant barriers to entry into the asphalt and tar roofing industry because (1) a roofing plant without a felt mill can be constructed for as little as $2.4 million, (2) municipal governments sometimes provide funds to encourage construction, (3) technological improvements have reduced entry costs, (4) a felt or mat producing facility, even though unnecessary, can be constructed for as little as $1.6 million, (5) used machinery is available, (6) advertising is not important in the industry, (7) small firms do well, and (8) there are ready means of distribution open to new entrants (Respondent's Proposed Findings IV., B., 1–16, pp. 30–36; *see* Findings 126–133). Although I agree with the position of counsel for JWC to the effect that such evidence is germane to questions as to the various aspects of an acquisition, including the probability of adverse competitive effects (Respondent's Reply Brief, p. 18), that does not negate the fact that in this acquisition substantial competition between Philip Carey/Panacon and Celotex was eliminated.

Ease of entry is not an effective defense to a charge that competition has been eliminated. In *Ekco Products Co.*, Dkt. 8122, 65 F.T.C. 1163, at 1208 (1964), *affirmed,* 347 F.2d 745 (7th Cir. 1965), the Commission said:

> . . . where the merger's effects on competition are those proscribed by Section 7, its illegality cannot be overcome by a showing of ease of entry. . . . Ease of entry may, to be sure, cause the market power of established firms to be eroded by the advent of significant new competitors; but this is likely to be at best a long-term affair. . . . In short, the absence of high entry barriers cannot be depended upon to ensure effectively competitive conditions. . . . [and] a merger that has been proved to be so anticompetitive as to violate Section 7, even apart from difficulty of entry into the market, cannot be defended on a mere showing of absence of high entry barriers.

[57] In a "horizontal" Section 7 case, the focus is on the existing competition rather than on the potential for additional competition, to which ease of entry primarily relates.

> [T]he existence of potential competition does not justify or excuse elimination of actual competition. In such a case, where the merger's effects on competition are those proscribed by Section 7, its illegality cannot be overcome by a showing of ease of entry. . . . Ease of entry may, to be sure, cause the market power of established firms to be eroded by the advent of new competitors; but this is likely to be at best a long-term affair. *See* Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics,* 74 Harvard L. Rev. 226–260 (1960). . . . *Cf.* Bain, Barriers to New Competition 189 (1956); Bain, Industrial Organization 425 (1959).

Also see American Brake Shoe Co., Dkt. 8622, 73 F.T.C. 610, 684 (1968).

5. Competitive Effects

The basic premise of Section 7 is that competition will be most vital when there are many sellers, none of which has any significant market share. *Philadelphia National Bank, supra,* 274 U.S. at 363; *Alcoa-Rome, supra,* 377 U.S. at 289.

Philip Carey/Panacon and Celotex were major competitors in the asphalt and tar roofing products industry and they held significant market shares. The competition between them was keen and substantial (Findings 140–142). The acquisition of Panacon by Celotex eliminated a significant, independent and vigorous competitor with the result that the buying options available to purchasers of asphalt and tar roofing products were reduced since Philip Carey/Panacon was eliminated as an independent source of supply (Finding 140).

Counsel for JWC cite *United States* v. *M.P.M.*, 397 F. Supp. 78, at 92 (D.C. Colo. 1975) (Respondent's Reply Brief, p. 19–20), for the proposition, in essence, that a horizontal merger is not illegal simply because (1) the combination increased the market share of one of the parties, (2) the new firm has more assets, and (3) there [58] are fewer competitors. In *M.P.M.*, the court did hold there was no violation of Section 7 when three ready-mix concrete producers combined. But the court also held that the market area (Denver) was unique; concentration was high and likely to remain so; and one of the firms was failing which made internal expansion a nonfeasible alternative (at 93). As indicated previously, not all of these important factors are present in this case and the *M.P.M.* decision does not otherwise persuade me that the result there should obtain here.

Section 7 was particularly directed against elimination of horizontal competition of the sort which existed between Philip Carey/Panacon and Celotex. The policy underlying the Section "is that corporate growth by internal expansion is socially preferable to growth by acquisition." *Philadelphia National Bank, supra,* 374 U.S. at 370; *accord, Ekco Products, supra,* 347 F.2d 745, at 752.

The Supreme Court repeatedly has ruled that acquisitions of competitors with even lower industry rankings than Philip Carey/Panacon and Celotex enjoyed are illegal. For example, in *Brown Shoe, supra,* the combined markets share was 5 percent. 307 U.S. 341–343. In *Alcoa–Rome, supra,* 377 U.S. at 271, acquisition of the ninth ranked firm, with 1.3 percent of the aluminum conductor market, by the market leader with a 27.8 percent market share was

found to be unlawful. Similarly, a merger between the sixth and seventh ranked firms, Blatz with 5.84 percent and Pabst with 5.48 percent, respectively, of the three-state beer market in *Pabst, supra,* 384 U.S. at 551–552, violated Section 7. Also, with a combined market share of 8.9 percent, a merger between the third-ranking firm with 4.7 percent and the sixth-ranking firm with 4.2 percent of the retail grocery market in the Los Angeles area was held in *Von's Grocery, supra,* 384 U.S. at 281, to violate Section 7. In *Fruehauf Trailer Co.,* 67 F.T.C. 878, 932 (1965), the Commission found that "major competitive factors in the relevant market" had been eliminated even though the combined market share was only 4.6 percent.

Instead of expanding with the possibility of market deconcentration, Celotex combined with Panacon and substantially increased its market share along with improving its standing amongst competitors in the asphalt and tar roofing products industry. Thus, the merger of Celotex and Panacon increased concentration and more firmly established Celotex in the relevant product market. Such results *by means of an acquisition* are exactly what Section 7 was enacted to prevent. [59]

CONCLUSIONS

1. The Commission has jurisdiction of and over the subject of this proceeding and Jim Walter Corporation (JWC), and the proceedings were and are in the interest of the public.

2. JWC was and is a corporation engaged in commerce as "commerce" is defined in the Clayton Act, as is its subsidiary, The Celotex Corporation (Celotex).

3. Panacon was a corporation engaged in commerce, as "commerce" is defined in the Clayton Act, when its stock was acquired by JWC through its wholly-owned subsidiary Celotex.

4. The appropriate line of commerce which should be considered in judging the legality of the acquisition is asphalt and tar roofing products.

5. The appropriate sections of the country in which the competitive effects of the acquisition should be examined are (1) the United States as a whole, and (2) a belt of 26 states running northeasterly from Texas to Maine.

6. The effect of the acquisition of Panacon by JWC through its subsidiary Celotex has been, and may be, substantially to lessen competition or to tend to create a monopoly in violation of Section 7 of the Clayton Act, as amended, in the following ways:

(a) Panacon has been eliminated as a substantial, viable competi-

tor in the asphalt and tar roofing industry in national and regional markets;

(b) Concentration in the asphalt and tar roofing product market has been substantially increased;

(c) The competitive position of JWC through Celotex vis-a-vis its competitors in the asphalt and tar roofing industry has been, and may be further, enhanced illegally.

7. The acquisition by JWC through Celotex of Panacon stock violated Section 7 of the Clayton Act, as amended (15 U.S.C. 18). [60]

The Remedy

Complaint counsel argues for total divestiture (Complaint Counsel's Brief, pp. 56–58), and the first general principle applicable to the corrective action to be taken when a violation of federal law is found is ". . . that once the government has successfully borne the considerable burden of establishing a violation of law all doubts as to the remedy are to be resolved in its favor." *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 334 (1961). The Commission has said that:

> The most appropriate remedy to redress a Section 7 violation is generally divestiture. It is specified in the enforcement provisions of the amended Clayton Act and normally commends itself as a rational course in restoring competition to the condition which obtained prior to the merger.

Diamond Alkali Co., Dkt. 8592, 72 F.T.C. 700, 742 (1967).

The Commission also has said, however, in deciding upon the appropriate remedy for a Section 7 violation, that it is incumbent upon the Commission to fashion a remedy which will, to the extent possible, restore competition at least to the state of health it might have enjoyed but for the acquisition, *Ekco Products, supra,* 65 F.T.C. at 1216, and if that competition can be improved upon so much the better. In fashioning orders to bring an end to violations of the laws which it enforces, the Commission has broad leeway and may exercise ". . . wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices. . . " *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952); *Thiret* v. *Federal Trade Commission,* 512 F.2d 176, 181 (10th Cir. 1975).

The Commission's powers to remedy unlawful corporate acquisitions are broadly equitable, no less so than under Section 5. Hence, in a Section 7 case, the question to be asked is: What kind of order, within the broad range of an equity court's remedial powers, would, in the particular circumstances, be most effective to "cure the ill

effects of the illegal conduct and assure the public freedom from its continuance"? *Ekco Products, supra,* 65 F.T.C. at 1215. [61]

In *Reynolds Metals Company* v. *Federal Trade Commission,* 309 F.2d 223, 231 (D.C. Cir. 1962), the Court said:

> Divestiture is an extremely harsh remedy, *see Timken Roller Bearing Co.* v. *United States,* 341 U.S. 593, . . ., and should be decreed as to property obtained by such an acquisition only when necessary to the restoration of the competitive situation altered by the acquisition. *See United States* v. *National Lead Co.,* 332 U.S. 319, 351–352 . . . (1947).

Also see United States v. *Reed Roller Bit Co.,* 274 F. Supp. 573, 586 (W.D. Okla. 1967). To the same end:

> The Court also in *du Pont* [*supra*] reaffirmed that the guidelines set by *United States* v. *American Tobacco Co.,* 221 U.S. 106, 185 . . . (1911) were still to be followed in its determination of the most effective and applicable form of relief, when an antitrust violation is found:
>
> > "[T]hree dominant influences must guide our action: 1, The duty of giving complete and efficacious effect to the prohibitions of the statute; 2, the accomplishing of this result with as little injury as possible to the interest of the general public; and, 3, a proper regard for the vast interests of private property which may have become vested in many persons as a result of the acquisition." 366 U.S. at 327 . . . .

International Telephone and Telegraph Corp. v. *General Telephone & Electronics Corp.,* 351 F. Supp. 1153, 1210 (D.C. Hawaii 1972).

I am not convinced that the divestiture complaint counsel seek would be the most effective way to cure the adverse competitive effects which resulted from the acquisition of Panacon by JWC. Rather, and in keeping with the Congressional purpose, *supra,* p. 54, competition more likely would be fostered if several smaller competitors or new entrants rather than only one were the beneficiaries of the divestiture. The evidence shows that small, single plant competitors can succeed in this industry (Findings 134–135). [62]

The record also establishes that the assets of the former Philip Carey Division of Panacon used to produce asphalt or tar roofing products are separable and severable from the Panacon assets acquired which were used for other unrelated products (Finding 37). The Philip Carey Division of Panacon consisted almost exclusively of plants for the manufacture of asphalt and tar roofing products which were sold through sales offices which were different from those used to sell Panacon's non-roofing products (Finding 39; CX 26 at 19).

Inclusion of assets used to produce items not included in the asphalt and tar roofing products line of Panacon would not aid in

restoring competition in that line of commerce. *See Reed Roller Bit, supra,* 274 F. Supp. at 586. In fact, ordering such divestiture could be construed as a punishment; and civil proceedings to punish antitrust violators are not authorized. The relief ordered must not be punitive. *du Pont, supra,* 366 U.S. at 326. The same end was reached in *Union Carbide Corporation,* 59 F.T.C. 614, 659 (1961), where the Commission said:

> . . . total divestiture is not an automatic remedy which must be applied in all cases. The choice of remedies is the Commission's to be exercised with the goal of restoring and assuring the preservation of healthy competition in the relevant markets. Achieving this goal may on occasion require ordering divestment of facilities unrelated to the line of commerce affected by the acquisition as, for example, where the restoration of the acquired company as a healthy competitor requires that it be kept intact. That situation is not presented by this record.

As in *Union Carbide,* and preferably from the number-of-competitors standpoint, each of the Philip Carey/Panacon plants acquired by Celotex producing asphalt and tar roofing products separately should be able to compete strontly and effectively in the lines of commerce identified with those products after the plants are sold. Testimony in the record suggests that success in this industry may be achieved by small firms starting out with a single plant (Finding 134). [63]

I do not agree with complaint counsel's proposal that divestiture by a "spin-off" should be mandated. The remedy called for herein can restore competition without imposition of so stringent a limitation as to how it is done. On the other hand, leaving a spin-off as an option would be desirable but requiring one would not because (1) a spin-off would be expensive, (2) it would involve consideration of and compliance with a variety of corporate, security and tax laws, (3) SEC registration would be required, and (4) there could be seriously adverse consequences to JWC stockholders (Respondent's Reply Brief, p. 39), none of which need be imposed upon JWC in order to protect the public interest here.

Nor do I agree with complaint counsel when they suggest that JWC should be required to guarantee the credit borrowing of a newly created corporation for five years or that JWC should forego sales to certain customer accounts for a three year period (Complaint Counsel's Brief, "Proposed Order," p. 55, Nos. 6 and 7). Such requirements are trade restraints in and of themselves and there has been no proof that the public interest requires their imposition in this case. *See Papercraft Corp.* v. *Federal Trade Commission, supra,* 472 F.2d at 931–32; *cf. Calnetics Corp.* v. *Volkswagen of America, Inc.,* 1976–1 Trade Cases 60, 757, pp. 68234, 68249–68250 (9th Cir. 1976);

Commission Opinion in *Ash Grove Cement Company,* Dkt. 8785, pp. 16–18 [85 F.T.C. 1123 at 1167–8], slip copy June 24, 1975).

The Philip Carey/Panacon plants should be sold as going concerns (1) separately to different buyers, preferably new or small competitors, (2) as a unit, *or* (3) spun off to a newly-created corporation. Under any of these alternatives, the plan is to be approved by the Commission when JWC has a specific proposal to present. In order to do the divesting, six months (Complaint Counsel's proposal) appears to be too short a time, while twenty-four months (the proposal of Counsel for JWC) appears to be too long a period. Instead of either, one year seems reasonable to accomplish a divestiture of this size. [64]

Nor do I agree with counsel for JWC that the Commission could not order divestiture of the Goldsboro plant even though the "Notice of Contemplated Relief" in the complaint did not include such a proviso. The notice order contains language to the effect that such relief as was deemed appropriate after the adjudicative hearing was held might be ordered (Complaint, p. 8). *Also see* "Remedy" cases cited, *supra.* However, I do agree with counsel for JWC that sale of the Goldsboro plant is not necessary in order to remedy the violation of Section 7 which occurred when Panacon was acquired. The Goldsboro plant was not completed until a year after the acquisition, it is not comparable in cost or production capacity to the much smaller plant Panacon contemplated building in Hopewell, Virginia, and restoration of the eliminated competition does not demand its divestiture (Findings 27, 43).

In *Reynolds Metals Company* v. *Federal Trade Commission, supra,* 309 F.2d at 231, the court held that an after-acquisition-acquired plant need not be sold because plants obtained by means of the acquisition could be divested without disturbance. The court said that divestiture of such after-acquired properties could be ordered if (1) they "represent reinvestment of capital realized from the sale of property included in a forbidden acquisition and replacement of that property," (2) the record demonstrates a "nexus between continued possession of after-acquired property . . . and the violation of Section 7," and (3) "restoration of the competitive status quo compels divestiture of such property." *Cf. Union Carbide Corporation, supra,* 59 F.T.C. at 657. None of these requirements is present here.

ORDER

1. *It is ordered,* That respondent Jim Walter Corporation (JWC) is to have its wholly-owned subsidiary, The Celotex Corporation (Celotex), divest within one (1) year from the date this order becomes

final, in such a [65] manner that a going concern or concerns result, all stock, assets, properties, rights, privileges and interests of whatever nature, tangible and intangible, including without limitation all plants, equipment, machinery, raw material reserves, inventory, customer lists, trade names, trademarks, goodwill, and other property of whatever description, of the Philip Carey Division of Panacon Corporation (Panacon) acquired by Celotex as a result of the acquisition of the stock of Panacon Corporation, together with all additions and improvements which have been made thereto.

2. *It is further ordered,* That no person who is an officer, director or executive employee of JWC, Celotex, or of any other subsidiary of JWC, or who owns or controls, directly or indirectly, more than one (1) percent of the stock of JWC or of any of its subsidiaries, shall be an officer, director or executive employee of a purchaser or shall own or control, directly or indirectly, more than one (1) percent of such a purchaser.

3. *It is further ordered,* That pending divestiture, JWC is to neither cause nor permit any deterioration beyond fair wear and tear and shall maintain the plants, machinery, buildings, equipment or other property or assets to be divested in prime operating condition so that its present capacity or market value is not lessened. [66]

4. *It is further ordered,* That the plants, machinery, buildings, equipment, or other property or assets divested are in no event to be of less value than that which obtained on the date Panacon was acquired.

5. *It is further ordered,* That JWC shall not acquire, directly, through subsidiaries, joint venture, or otherwise, without the prior approval of the Federal Trade Commission, the whole or any part of the stock, share capital or assets of any concern engaged in the manufacture, sale, or distribution of any asphalt or tar roofing product; nor shall JWC or its subsidiaries enter into any arrangement with any such concern by which JWC or its subsidiaries obtain the market share, in whole or in part, of any such concern for a period beginning with the date this order becomes final and terminating ten (10) years after the divestiture ordered has been completed.

6. *It is further ordered,* That, as used in this order, the acquisitions to which Paragraph 5 pertains include any arrangements by JWC with any other party (1) whereby such other party discontinues the manufacture of any asphalt or tar roofing product under a brand name or label owned by such other party and thereafter distributes any of said products under any JWC, or its

subsidiaries', brand names or labels, or (2) whereby such concern discontinues its participation in the asphalt and tar roofing industry and thereafter transfers to JWC, [67] or its subsidiaries, its customer lists or in any other way makes available to JWC its customers or customer accounts.

7. *It is further ordered,* That respondent shall periodically, within sixty (60) days from the date this order becomes final and every sixty (60) days thereafter, submit to the Federal Trade Commission a detailed, written report of its actions, plans and progress in complying with the provisions of this order, and fulfilling its objectives. All compliance reports shall include, among other things that are periodically required, a summary of all serious discussions and negotiations with any persons who are potential owners or managers of the assets to be divested, the identity of all such persons as well as all internal memoranda, reports and recommendations concerning divestiture.

8. *It is further ordered,* That JWC is to notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the corporate structure such as dissolution of subsidiaries or any change in the corporation which may affect compliance obligations arising out of the order.

Opinion of the Commission

By Clanton, *Commissioner:*

The Commission issued its complaint in this matter on July 29, 1974, charging respondent Jim Walter Corporation (hereafter "JWC") with violating Section 7 of the Clayton Act (15 U.S.C. 18) by virtue of its April 1972 acquisition of Panacon Corporation (hereafter "Panacon"). The complaint alleged that the acquisition would have the probable effect of substantially lessening competition in the manufacture and distribution of "all asphalt roofing materials and of built-up roofing and shingles in the United States as a whole, and in certain states" by, *inter alia,* eliminating actual competition between JWC and Panacon in the relevant markets, discouraging entry of other firms, reducing the probability of independent pricing and enhancing the dominant position of JWC in the relevant market. JWC's asphalt roofing operations are conducted through its wholly-owned subsidiary, the Celotex Corporation (hereafter "Celotex"); and prior to the merger Panacon manufactured asphalt roofing products through the [2] Philip Carey Company (hereafter "Philip Carey"), a division of Panacon. (I.D. 15–16, 37)[1] A brief

[1] The following abbreviations will be used throughout this opinion:

(Continued)

review of the history of the merging firms and the acquisition places this merger in perspective.

JWC, one of the nation's largest building and construction materials companies, is a publicly held corporation chartered and operated under the laws of the State of Florida with headquarters in Tampa, Florida. (I.D. 1-2) For its fiscal year ending August 31, 1972, the year of the merger, the firm reported consolidated revenues of $885,172,000; total assets of $983,217,000; and net income of $44,568,000. (I.D. 6) The origins of JWC trace back to 1946 when Jim Walter, now Chairman of the Board, formed a small partnership engaged in the construction of partially finished (or shell) homes. This activity constituted the principal business of the firm through its incorporation as JWC in 1955 until the early 1960's. (CX-28, p. 20) However, beginning with its purchase of a 34 percent stock interest in Celotex in 1962 (and the remainder of the stock in 1964), JWC's most dramatic growth resulted from a series of more than 20 acquisitions during the ten-year period preceding issuance of the complaint. Many of these acquired companies were merged into subsidiaries of JWC, including Celotex. (I.D. 7) As of the time of the instant acquisition, JWC conducted its operations through a large number of subsidiary corporations[2] which were organized into nine operating groups: mineral and fiber products; pipe products; home building; metal and wood products; stone and concrete products; paper; sugar; savings and loan operations; and oil and gas operations. (I.D. 3, 5) [3]

Significantly, JWC's entry and expansion in the asphalt and tar roofing market have been achieved through acquisition. The Celotex purchase gave JWC a one-plant capacity which was increased to eight plants by the acquisition of the Barrett Building Materials Division of Allied Chemical Corporation in 1967. (I.D. 18-19) The Panacon merger added yet five more roofing facilities previously operated by the Philip Carey Division. (I.D. 39)

Celotex is a wholly-owned JWC subsidiary incorporated under Delaware law; the firm shares headquarters with its parent in Tampa, Florida. (I.D. 15, 33) Apart from its asphalt roofing business, Celotex also produces a variety of other building materials including

I.D. - Initial Decision, Finding No.
I.D. p. - Initial Decision, Page No.
CX - Complaint Counsel's Exhibit No.
RX - Respondent's Exhibit No.
Tr. - Transcript, Page No.
RAB - Respondent's Appeal Brief
CAB - Complaint Counsel's Answering Brief
RPF - Respondent's Proposed Finding No.
CPF - Complaint Counsel's Proposed Finding No.

[2] As of August 31, 1972, JWC had 28 wholly-owned or controlled subsidiaries. (CX-35M)

gypsum wallboard insulation, acoustical products and siding. (I.D. 16) The company's sales of asphalt roofing products amounted to $60,151,000 in 1971 and positioned it as the fifth ranking firm in an industry with total shipments valued at $680,980,400. (I.D. 20, 112; CX-15B *in camera*)[3] In addition to its existing roofing plants, Celotex had under construction at the time of the Panacon merger a new asphalt roofing plant in Goldsboro, North Carolina, estimated to cost $9-12 million. (I.D. 21)

Prior to its merger with JWC, Panacon was a corporation chartered under Michigan law, with its principal place of business at Cincinnati, Ohio. (I.D. 34) The Glen Alden Corporation held 89 percent of the stock in Panacon, the surviving entity of a 1970 merger between the Philip Carey Corporation and Briggs Manufacturing Company. (I.D. 35, 36) For calendar year 1971, Panacon reported revenues of $181,129,000; total assets of $106,008,000; and net profits of $10,591,293. (I.D. 37)

As did JWC, Panacon manufactured a wide range of building products through six operating divisions, including [4] Philip Carey. (I.D. 37) The latter was a major producer of asphalt and tar roofing products, with sales of $59,852,000 in 1971, a volume which made it the number six firm nationally in that market. (CX-15B, *in camera*) Philip Carey also was contemplating construction of a new roofing plant in Hopewell, Virginia at the time of the acquisition. In contrast to Celotex' Goldsboro facility, the Hopewell plant was estimated to cost only about $2 million, with less capacity and no felt mill. Plans for the Hopewell plant were scrapped after the merger. (I.D. 42, 43)

The acquisition of Glen Alden's 89 percent stock in Panacon on April 17, 1972, culminated several months of negotiations between officials of JWC and Glen Alden. (I.D. 46-51) Although Celotex ultimately purchased the stock, the deal was planned, negotiated and approved by JWC. (I.D. 65) The total purchase price, including the price paid for the remaining 11 percent interest, was $73 million. (I.D. 59) Following Panacon's merger into Celotex on June 30, 1972, the various divisions of Panacon were placed under different operating groups of JWC, although Philip Carey continued to be operated by Celotex. (I.D. 63-64) The merger propelled Celotex into the number two position in the asphalt and tar roofing market in 1972, with a market share of 17.2 percent and sales of $131,633,000. (CX-15C, *in camera*)

The administrative law judge, in his Initial Decision, determined that the acquisition violated Section 7 by intensifying concentration

[3] References to *in camera* data and testimony in this opinion reflect the fact that various orders issued by the ALJ providing for such protection expired by their terms on October 30, 1977.

in the already highly concentrated asphalt and tar roofing industry, contributing significantly to an industry trend toward concentration and eliminating Philip Carey as a substantial competitive force in the market. (I.D. 139, 143) The law judge found the relevant line of commerce to be asphalt and tar roofing products and the geographic markets to consist of a national market and a 26-state (plus D.C.) regional market extending from Texas to Maine. (I.D. 80, 114) As relief the ALJ ordered divestiture of the Philip Carey assets and a ten-year ban on future acquisitions without prior Commission approval. Respondent appeals from the Initial Decision on both jurisdictional and substantive grounds. Complaint counsel, although not filing a cross appeal, urge the Commission in their answering brief to modify the ALJ's proposed order to require a spin-off of Panacon plus Celotex' Goldsboro, North Carolina plant. Our review of the issues follows. [5]

I. JURISDICTION

A. Proper Party

Before reviewing the legality of the acquisition, we must address a threshold issue raised by respondent as to the Commission's jurisdiction in this matter. Respondent contends that the complaint should be dismissed because (1) the Commission failed to name JWC's wholly owned subsidiary, Celotex, which bought the stock of Panacon, as a party to the proceeding, and (2) JWC is not "engaged in commerce" within the meaning of Section 7. It is argued that Celotex is an indispensable party, indeed the proper party, since the ALJ's order would require the divestiture of properties owned by Celotex. At most, respondent argues, the Commission's jurisdiction over JWC is only "ancillary" and cannot be exercised without the presence of the party which has committed the alleged wrongdoing, Celotex. (RAB at 12) As for the "commerce" requirement, respondent takes the position that JWC is a holding company which does not engage in the production, distribution or acquisition of goods or services in interstate commerce. We will deal with each of these issues in turn.

The ALJ concluded it was proper to name only JWC as the respondent, stating that:

> When the pattern and framework of the whole enterprise are taken into consideration (*see Art National Manufacturers Distributing Co.* v. *Federal Trade Commission*, 298 F.2d 476, 477 (2d Cir. 1962), *cert. denied*, 370 U.S. 939 (1962)), it is clear that naming JWC as the respondent in this matter is proper. The evidence is persuasive that

Celotex and JWC were alter egos in many respects and that JWC is the corporation which played the dominant role in the acquisition. (I.D. p. 41)

Even in the absence of the kind of direct involvement shown here, the law judge noted that a parent corporation, such as JWC, is liable for the acts of its subsidiaries where the facts demonstrate latent control by the former over the latter, citing *P. F. Collier & Son Corp.* v. *FTC,* 427 F.2d 261 (6th Cir. 1970), *cert. denied,* 400 U.S. 926 (1970) and [6] *Beneficial Corp.,* 86 F.T.C. 119 (1975), *aff'd in part and rev'd in part on other grounds,* 542 F.2d 611 (3d Cir. 1976), *cert. denied,* 430 U.S. 983 (1977).

We agree that JWC is properly named and Celotex is not an indispensable party to these proceedings. Where the public interest is at stake, the courts and the Commission have consistently looked to the relevant statutory framework and its underlying policy in determining whether separate corporate identities should be respected. *E.g., Zale Corp. and Corrigan-Republic, Inc.* v. *FTC,* 473 F.2d 1317 (5th Cir. 1973); *P. F. Collier, supra; Bowater Steamship* v. *Patterson,* 303 F.2d 369 (2d Cir. 1962), *cert. denied,* 371 U.S. 860 (1962); *Beneficial Corp., supra; Great Lakes Carbon Corp.,* 82 F.T.C. 1529 (1973). In *Bowater,* a case interpreting the Norris-LaGuardia Act, Judge Friendly explained the kind of analysis required in such situations:

Whether a subsidiary corporation is to be considered a separate entity "cannot be asked, or answered, *in vacuo,*" Latty, The Corporate Entity as a Solvent of Legal Problems, 34 Mich. L. Rev. 597, 603 (1936); the issues in each case must be resolved in the light of the policy underlying the applicable legal rule, whether of statute or common law . . . . As the Supreme Court has repeatedly taught, the policy behind the Norris-LaGuardia Act was a strong one; we cannot think Congress would have meant this to be defeated by the fragmentation of an integrated business into a congeries of corporate entities, however much these might properly be respected for other purposes. (303 F.2d at 372–73)

Similarly, in the context of Section 5 of the Federal Trade Commission Act, separate incorporation has not prevented inquiry into the overall nature and operation of a business enterprise. Thus, in *Zale* (a Truth in Lending/Section 5 action), the Fifth Circuit upheld the Commission's finding of liability as to the parent and entry of an order against unnamed subsidiaries, concluding that:

The integrated operation, interlocking directorate and unified advertising strongly militate for finding the enterprise to be the appropriate subject for the Commission's order and for application of the exceptions to recognition of separate corporate entities where to do so frustrates a statutory policy. (473 F.2d at 1321)

[7] In *Beneficial,* the Commission specifically rejected the contention

advanced by respondent here that the common law rule for piercing the corporate veil should govern, quoting the following language from *P. F. Collier:*

"Manifestly, where the public interest is involved, as it is in the enforcement of Section 5 of the Federal Trade Commission Act, a strict adherence to common law principles is not required in the determination of whether a parent should be held for the acts of its subsidiary, where strict adherence would enable the corporate device to be used to circumvent the policy of the statute. *P. F. Collier, supra,* 427 F.2d at 267. *See also, e.g., Goodman* v. *Federal Trade Commission,* 244 F.2d 584, 590 (9th Cir. 1957)." (86 F.T.C. at 159)

The Commission not only found the parent, Beneficial Corporation, responsible for the acts of its subsidiaries but also issued an order running to its unnamed subsidiaries.[4]

In light of these principles we will examine the language and purposes of Section 7 of the Clayton Act as well as the relationship between JWC and Celotex in connection with the instant acquisition. Section 7 provides, in part, that "no corporation engaged in commerce shall acquire, *directly or indirectly,* the whole or any part of the stock or other share [8] capital . . . ." (emphasis added) The House Report on legislation leading to passage of the 1950 amendments to Section 7 explains why the words "directly or indirectly" were originally included in the statute:

The bill retains the language of the present statute which is broad enough to prevent evasion of the central purpose . . . . It forbids not only direct acquisitions, but also indirect acquisitions, whether through a subsidiary or an affiliate or otherwise. H.R. Rep. No. 1191, 81st Cong., 1st Sess. 8–9 (1949).

When viewed in the context of the evils which Section 7 was designed to prevent, the reach of this provision is understandable. In fact, the principal purpose for enactment of the original version of Section 7, prior to its amendment in 1950, was to get at stock acquisitions of competitors by holding companies, a device Congress rightly feared could be used to escape the strictures of the Sherman Act. Underlying consideration of the 1950 amendments was a "fear of what was considered to be a rising tide of economic concentration in the American economy." *Brown Shoe Co.* v. *U.S.,* 370 U.S. 294, 315 (1962). To aid in stemming that tide, the 1950 legislation, among

[4] We reject respondent's contention that these cases require some showing that the corporate device is being used to evade the policy of the statute before separate incorporation can be disregarded. Although there may have been some basis for such a conclusion in *Collier,* neither that case nor the decision in *Beneficial* was premised on a showing of wrongful intent. A similar view was expressed in *Kavanaugh* v. *Ford Motor Co.,* 353 F.2d 710 (7th Cir. 1965), a case interpreting The Automobile Dealers' Franchise Act. In concluding there that the individual dealer had standing to sue under that Act, apart from any standing the corporate dealership might have, the court recognized that the purposes of the statute "would be subverted if the corporate format adopted by the parties were given recognition." The court further noted that "[i]ntention is not controlling when the fiction of corporate entity defeats a legislative purpose." *Id.* at 717. *See also, Anderson* v. *Abbott,* 321 U.S. 349, 357–58 (1944).

other things, extended coverage to asset acquisitions and clarified that all mergers—horizontal, vertical and conglomerate—were subject to the statute's prohibitions.[5]

Enactment of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. Law 94–435, 15 U.S.C. 18 a, adding Clayton Act Section 7A, provides further support of Congress' intent to focus upon the realities, rather than the form, of the challenged acquisition. Section 7A(b)(3)(B) of the Clayton Act, 15 U.S.C. 18a(b)(3)(B), requires that:

> The amount or percentage of voting securities or assets of a person which are acquired or held by another person shall be determined by aggregating the amount or percentage of such [9] voting securities or assets held or acquired by such other person *and each affiliate thereof.* (Emphasis added)[6]

Clearly, then, any assessment of the legality of a merger must take account of the relationship between the acquiring and acquired firms, and the probable impact on competition, from the perspective of their overall operations.

To suggest, as respondent now does, that a far-flung corporate enterprise should be carved up into its component legal entities for purposes of Section 7 merger analysis flies in the face of the express language of the statute and the legislative policy supporting it. The dangers of treating Celotex as the primary respondent, and joining JWC for purposes of relief only, are rather plain. Should JWC desire to acquire other asphalt roofing firms, it presumably could do so through its other non-roofing subsidiaries, thereby excluding from merger scrutiny the horizontal effects of competing sister firms.[7] Even apart from such an obvious loophole, looking only to the operations of the acquiring subsidiary ignores the competitive effects of the parent's resources and market power in other related areas which may bear upon the legality of the [10] merger. Such considerations are fundamental in actions premised on vertical or potential competition theories.[8]

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[5] *Brown Shoe, supra,* at 317. Of course, the Supreme Court subsequently ruled that the original Section 7 in fact did apply to acquisitions other than those involving actual competitors. *United States* v. *E. I. DuPont de Nemours & Co.*, 353 U.S. 586 (1957).

[6] Although the House bill originally defined the term "affiliate" as "any person who controls, is controlled by, or is under common control with, a corporation," the final version adopted by Congress left the task of defining this and other terms to the Commission, with the concurrence of the Attorney General. *Compare* H.R. Rep. No. 94–1373, 94th Cong., 2d Sess. 2 (1976) *with* Clayton Act Section 7A(d)(2)(A), 15 U.S.C. 18a(d)(2)(B).

[7] Respondent further argues that even a direct acquisition by a parent holding company of a competitor of the parent's subsidiary can be reached under Section 7 only by suing the subsidiary as the indirect purchaser of the acquired firm. That kind of situation, it is claimed, is what the indirect acquisition language in Section 7 was designed to cover since the holding company by definition would not be engaged in commerce and therefore could not be challenged directly under the statute. (RAB at 16–17) Such an interpretation of Section 7 is so patently illogical as to require no further discussion.

[8] The vertical implications are evident in *Permanente Cement Co.*, 65 F.T.C. 410 (1964), where the Commission deemed the parent, Permanente, to be the acquiring firm although the acquisition was actually made by its wholly owned subsidiary, Glacier. The Commission noted that the critical factor was the supplier-customer relationship

(Continued)

Thus, given the purposes of Section 7, we believe it permissible without more to consider JWC and its wholly-owned subsidiary Celotex a single entity for purposes of assessing the legality of the merger and ordering appropriate relief, even though Celotex has not been joined as a party to this proceeding. In our view the statutory policy at stake here transcends the legal distinctions that might be relevant in other contexts.[9] Nevertheless, despite the strong basis for this conclusion, there is more here which bolsters our decision to hold JWC exclusively responsible for the acquisition of Panacon.

The record is clear that "JWC actively participated in direction of the course of events leading up to and following the acquisition by Celotex of the Panacon stock." (I.D. 65) Such participation, of course, is sufficient by itself to establish that JWC is independently liable for the merger.[10]

[11] The facts, which are largely undisputed, reveal that the negotiations with the Glen Alden Corporation for the purchase of Panacon were initially handled by JWC officials. (I.D. 46, 47) During these negotiations, the representatives of Panacon understood that JWC would acquire Panacon (I.D. 51) and the contract would be assigned to Celotex. Such an assignment provision was included in the draft agreement between JWC and Glen Alden (I.D. 55), and a press release issued jointly by JWC and Glen Alden two weeks prior to the acquisition announced that JWC, not Celotex, would acquire Glen Alden's interest in Panacon. (I.D. 52) The record further shows that on April 14, three days prior to the acquisition, the Board of Directors of each firm met separately to approve the transaction. (I.D. 57, 58) Finally, on April 17, 1972, Celotex purchased a controlling interest in the stock of Panacon from Glen Alden using funds borrowed from JWC. The press release of the same date did not mention Celotex. (I.D. 59)

Furthermore, JWC exercises considerable control and influence over the financial, legal and promotional affairs of Celotex. For example, JWC appointed or elected all of the Celotex' Board of Directors and, in April 1972, there was a substantial overlap between the officers and directors of the two corporations. (I.D. 29, 30) In addition, Celotex could not contract to borrow funds (I.D. 32) or

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between Permanente and the acquired firm, Readymix Concrete Company, rather than any competitive relationships between Glacier and Readymix. (*Id.* at 492, n. 7) Although Glacier was named as a respondent there, the Commission's decision did not hinge on that fact.

[9] We do not imply that the separate incorporation of JWC and Celotex should be disregarded for all purposes; that must be determined in light of the applicable facts and legal principles in each case.

[10] By analogy, under Section 5 of the FTC Act, liability for supporting an unlawful scheme or placing in the hands of another the means for committing an unfair or deceptive practice is well established. *See, e.g., FTC* v. *Winsted Hosiery Co.*, 258 U.S. 483, 494 (1922); *Regina Corp.* v. *FTC*, 322 F.2d 765, 768 (3d Cir. 1963); *C. Howard Hunt Pen Co.* v. *FTC*, 197 F.2d 273, 281 (3d Cir. 1952).

arrange for legal services (I.D. 26) without going through JWC. JWC also set general employment policies for Celotex, had a centralized research operation and promoted the JWC name over that of its subsidiaries. (I.D. 24, 27–28)

From this description of the relationship between JWC and Celotex and the circumstances surrounding the Panacon acquisition, there can be little doubt as to which firm "called the shots" and orchestrated the negotiations. JWC's role in this merger appears to be similar to the role it played in previous acquisitions by its subsidiaries. (I.D. 55) As in *Zale* and *Beneficial Corp.*, the facts here indicate that, *insofar as the merger is concerned,* there was, in effect, a "single enterprise." The ALJ was quite correct in concluding that JWC played the dominant role and JWC and Celotex were for all practical purposes alter egos. Indeed, the relationship between JWC and Celotex in the context of this merger suggests that even the more stringent common law standard urged by respondent has been met. *See Beneficial Corp., supra,* 86 F.T.C. at 162.

Accordingly, in light of the facts of this case and the public policy underpinning Section 7, there is ample justification for naming JWC as the only party in this proceeding [12] and for issuing an order that is binding upon Celotex.[11]

However, even were it construed that an order running against JWC does not bind Celotex, it does not follow that Celotex is an indispensable party. Where the proceeding involves "the protection and enforcement of public rights, there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights." *Nat'l Licorice Co.* v. *NLRB,* 309 U.S. 350, 363 (1940). There the Court upheld the NLRB's authority to strike down an employer-employee contract to waive provisions of the National Labor Relations Act without joining the employees who were parties to the contract. In so holding, the Court took note of numerous cases under the antitrust laws where offenders have been restrained from carrying out contracts with persons not parties to suits. (*Id.* at 365–66) More recently, the Second Circuit in *Pepsico,*

[11] The uniform absence of any countervailing legislative policy clearly distinguishes those cases cited by respondent where the courts have been hesitant to disregard separate incorporation of related entities in various contexts. For example, respondent cites *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186 (1974) as evidence of the Court's desire to adhere to legal corporate separation in the context of Sections 2(a), 3 and 7 of the Clayton Act. That case is characterized by respondent as one where Clayton Act jurisdiction did not reach to the acts of a wholly-owned subsidiary which was not engaged in interstate commerce, although its parent was so engaged. The argument is off the mark for several reasons. In the first place, the issue as to whether interstate sales by the parent could be imputed to the subsidiary was not before the Court. Moreover, the specific language of Sections 2(a) and 3 not only requires that the person charged be engaged in commerce but that the allegedly illegal activity be "in the course of such commerce," an arguably narrower inquiry than would occur under Section 7. Section 2(a) further specifies that one of the purchases involved in an alleged price discrimination be "in commerce." As for the Section 7 issue in that case, it is wholly irrelevant to respondent's argument in this case that a parent's interstate activity cannot be imputed to its subsidiary prior to their merger.

Inc. v. *FTC*, 472 F.2d 179 (1972), reaffirmed the principle that respondents in public proceedings, such as those before the Commission, may be subject to orders preventing them from carrying out contractual obligations to unnamed third parties. In disputing the argument that such respondents might be held liable to [13] an unjoined third party for complying with an FTC cease and desist order, the court further noted that in agency proceedings "seeking to vindicate public rights against a respondent, the private rights of other parties can be concluded if they have had notice and an opportunity to intervene." (*Id.* at 188, n. 10 and accompanying text)

In the instant proceeding, there are no third party rights in the sense that those rights existed in *Nat'l Licorice*. Whatever rights Celotex has in terms of the merger are derived from the specific authority granted by JWC. There is no contention that Celotex has any interest different from that of JWC or that it has been disadvantaged in any way by not being a party. Counsel for respondents have looked after the interests of Celotex; indeed, Celotex cannot hire counsel without permission from JWC. (I.D. 26)

Furthermore, it cannot be seriously contended that complete relief is feasible only by joining Celotex. As the architect of the acquisition, JWC has complete control over Celotex and there is no reason to believe that it lacks any authority to undo what it created in the first place.[12] Moreover, as the court indicated in *Pepsico*, the Commission's ruling in this matter would appear to be binding on Celotex in any event since it has not attempted to intervene in this matter after having ample opportunity to do so.

For the above reasons, the Commission concludes that JWC is the proper party to this proceeding and there is no necessity to join Celotex. [14]

B. "In Commerce" Requirement

A second challenge to the Commission's jurisdiction advanced by respondent is that it is not "engaged in commerce" within the meaning of Section 7. Relying upon the Supreme Court's decision in *United States* v. *American Building Maintenance Industries*, 422 U.S. 271 (1975), JWC contends that a holding company, with offices located only in Florida, is not "directly engaged in the production, distribution, or acquisition of goods or services in interstate commerce." (*Id.* at 283) The ALJ held to the contrary citing, *inter alia*, the interstate character of JWC's activities in acquiring Panacon and other corporations (including the financing of such

[12] Although the Federal Rules of Civil Procedure are not applicable to administrative proceedings, the facts of this case suggest that joinder is unnecessary even under the criteria set forth in Rule 19(a).

acquisitions), the issuance and sale of securities on public exchanges, and JWC's supervision of the activities of its subsidiaries which are located in various states.

There is no dispute that Celotex is engaged in commerce for Section 7 purposes. (Resp. Admissions, para. 12) Whether JWC is so engaged requires little more discussion. As previously noted, JWC was directly and substantially involved in the affairs of its subsidiaries, exercising control through extensive director/management interlocks, serving as the vehicle for those entities to obtain necessary financing and providing legal services. Given the history of JWC's origin, growth and present activities, it is clear that respondent is more than a mere bystander with respect to its subsidiaries; it is the guiding, indeed dominant, force throughout the entire corporate organization.

Under such circumstances, there can be no question but that JWC is engaged in commerce within the meaning of Section 7 of the Clayton Act. Respondent's rather crabbed interpretation of the Court's language in *American Building,* that "a corporation must itself be directly engaged. . . in interstate commerce," finds no support in that decision. Nowhere in that case is there the slightest hint that a corporation operating through its subsidiaries, which in turn are admittedly involved in interstate commerce, falls outside the reach of Section 7 because it is not deemed to be "engaged in commerce." While Celotex' interstate activities alone suffice to bring its parent, JWC, within the jurisdictional ambit of Section 7, the latter's own activities [15] provide a separate basis for concluding that jurisdiction exists.[13]

In a different but analogous context, the Supreme Court has looked behind the facade of a holding company for purposes of determining jurisdiction under the Public Utility Holding Company Act of 1935. In *North American Co.* v. *SEC,* 327 U.S. 686 (1946), the Court found that the parent's relationship to its subsidiaries justified imputing the interstate activities of the subsidiaries to the parent:

> In view of North American's very substantial stock interest and its domination as to the affairs of its subsidiaries, as well as its latent power to exercise even more affirmative influence, it cannot hide behind the facade of a mere investor. These acts are its acts in the sense that what is interstate as to them is interstate as to North American. These subsidiaries thus accentuate and add materially to the interstate character of North American. (Citation omitted.) (*Id.* at 695)

[13] It should also be noted that the Court in *American Building* did not decide whether jurisdiction would have been triggered had there been a showing that the acquired firm purchased supplies from out-of-state suppliers or obtained contracts through interstate solicitation or negotiations. (*Id.* at 285) Even had those factors been present in that case, it is distinguishable from the instant proceeding where the interstate nature of the activities of both JWC and Celotex was far more substantial.

While the issues there were grounded in constitutional terms, the Court concluded that the parent "bears not only a 'highly important relation to interstate commerce and the national economy' (citation omitted), *but is actually engaged in interstate commerce.*" (*Id.* at 695–6) (Emphasis added.) The reasoning in that case seems apropos here in view of the close relationship between JWC and Celotex.[14]

From the foregoing, we conclude that JWC is properly subject to the jurisdiction of the Commission. [16]

II. Product Market

Applying the familiar criteria set forth in *Brown Shoe Co., supra*[15] the Administrative Law Judge concluded that asphalt and tar roofing products constituted the relevant line of commerce for assessing the competitive effects of the merger.[16] Respondent vigorously contests the Administrative Law Judge's finding, asserting instead that the appropriate market consists of all roofing products.

Obviously, in the broadest sense all roofing products serve the same basic purpose of sheltering the interior of a structure from the elements, whether the structure is residential or commercial. Within the confines of factors such as the slope of the roof, fire and wind resistance, aesthetics, price and durability, consumers of roofing products can choose among a variety of goods.[17] Nevertheless, the "outer boundaries" of a roofing market do not preclude the existence of "well-defined" submarkets for antitrust purposes. *Brown Shoe, supra,* 370 U.S. at 325. Of course, in ascertaining the proper market, the Supreme Court has cautioned that the *Brown Shoe* criteria "offer no precise formula for judgment and they necessitate, rather than avoid, careful consideration based on the entire record." *United States* v. *Continental Can,* 378 U.S. 441, 449 (1964).

After reviewing the record within this framework, we conclude that asphalt and tar roofing products are a distinct submarket for purposes of assessing the legality of this merger.

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[14] We do not reach the alternative grounds urged by complaint counsel for exercising jurisdiction under the second paragraph of Section 7 which makes no reference to the acquiring corporation's engagement in interstate commerce. Whatever circumstances might necessitate invoking that provision, there is sufficient evidence here for finding JWC to be engaged in interstate commerce.

[15] Those criteria include "[i]ndustry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct prices, sensitivity to price changes, and specialized vendors . . . ." *Id.* at 325.

[16] No offer of proof was made as to the separate submarkets of built-up roofing and shingles alleged in the complaint. (Para. 15)

[17] Roofing products other than asphalt and tar include such products as wood shingles and shakes, clay and cement tile, slate, and plastic shingles and sheets. (I.D. 66)

These products consist of three basic types of materials–asphalt or tar saturated felts, asphalt roll roofing and [17] asphalt shingles.[18] (I.D. 70) Saturated felts are often used as an underlayment for other types of asphalt roofing; they consist of dry felt impregnated with asphalt or coal tar. (CX–1, p. 12) The felt can either be organic (made from wood chips, newspapers, cartons, rags, wood flour, and other cellulose materials) or inorganic (made from asbestos or fiberglass fibers). (I.D. 73) Roll roofing is basically saturated felt which has been sealed by an application of a harder, more viscous coating of asphalt than that used for the saturation process. (CX–1, p. 5) Some roll roofing is surfaced with mineral granules. (CX–1, p. 12) Shingles are basically mineral surfaced roll roofing cut into strips or patterns. All three categories of asphalt and tar roofing products come in different weights and patterns.

Asphalt and tar roofing products can be used on almost every type of roof in the United States. Shingles, which do not completely seal the surface of the roof from water, are used on roofs sufficiently steep so that water runs off, *i.e.*, normally roofs pitched at 4 inches or more per horizontal foot. (CX–1, p. 20) Built-up roofing, consisting of successive piles of asphalt or tar saturated felts, and roll roofing bonded with asphalt or coal tar pitch are used on flat or less-steeply sloped roofs.

In 1972 the asphalt and tar roofing industry included 32 firms operating approximately 108 roofing plants scattered throughout the United States. (I.D. 123; CX–68C) An estimated 80 percent of all residential, commercial and industrial roofing is made from asphalt and tar products.[19] A closer [18] examination of the industry in light of the indicia described in *Brown Shoe,* with particular emphasis upon production considerations and prices, reveals more clearly its commercial significance as a separate market.

Considering the *Brown Shoe* criteria as set forth in that decision, we find that the record confirms industry recognition of asphalt and tar products as a distinct market, based on testimony of industry members as well as the existence of a trade association with regular membership restricted to domestic manufacturers of asphalt and/or tar roofing products. For example, Mr. Snow, a Johns-Manville

[18] Accessory items, such as coatings, cements, fasteners and adhesives, used in connection with the installation of asphalt and tar products (I.D. 70) are excluded from the relevant product market. Although asphalt coatings, for example, are used in the repair or resurfacing of existing roofs (RPF III A.17), and are produced by firms not engaged in the manufacture of asphalt and tar roofing products (RX 53), such materials are properly excluded from the product market because they are not suitable substitutes for original installation.

[19] The 80 percent figure was supplied by the Asphalt Roofing Manufacturers Association, the industry trade organization. (CX–1, p.1) Even higher estimates were provided by two Celotex witnesses who indicated that asphalt roofing products had gained anywhere from 85 to 90 percent of the residential market. (Tr. 1274, 1646) Another witness, Mr. Snow, a vice president of Johns-Manville, estimated asphalt and tar roofing's share of total commercial roofing to be 95 percent. (Tr. 800)

representative, recognized the asphalt and tar roofing industry as a separate industry. (Tr. 699) Even one of respondent's witnesses, Michael Malarkey, president of Herbert Malarkey Roofing Co., an asphalt roofing manufacturer, admitted that he did not run into "any great amount" of competition from other forms of roofing materials. (Tr. 1958) Another industry member was unable to recall any pricing discount policies of non-asphalt manufacturers. (I.D. 101)

The existence of a trade association—the Asphalt Roofing Manufacturers Association (ARMA)—reflects even broader recognition by industry of asphalt and tar roofing products as a separate economic market. (I.D. 82) *See also United States* v. *Pennzoil,* 252 F.Supp. 962, 970 (W.D. Pa. 1965); *United States* v. *Aluminum Co. of America,* 233 F. Supp. 718, 724 (E.D. Mo. 1964), *aff'd per curiam,* 382 U.S. 12 (1965). In addition to promotional activities, ARMA helps finance industry research, assists in the development of product performance standards, and provides tecnhical assistance to roofing contractors (I.D. 82, Tr. 124–25) The managing director of ARMA, Mr. Whittemore, also noted that the organization's compilation of shipping data of member firms was designed to inform them as to how they were faring in the market in relation to each other. (Tr. 128)[20]

[19] The record also justifies the conclusion that asphalt and tar roofing products have peculiar characteristics and uses. The most obvious distinguishing features of these products are their physical appearance and composition. (I.D. 87)[21] Separate standards for weight, composition, fire retardancy and wind resistance, established by the American Society for Testing Materials (ASTM) and Underwriters Laboratories (UL), attest to the unique nature of these products.

More importantly, these characteristics suggest differences in use that are of significance to consumers. For example, asphalt shingles can achieve a higher UL rating (Class A) as to fire retardancy than wood shingles or shakes, the most popular non-asphalt roofing product for homes. (I.D. 90) As the ALJ noted, wood shingles and shakes must be specially treated to merit a Class B or C rating, a process that substantially increases their cost. (I.D. 91) Although

[20] Respondent, however, argues that the trade association here, as in *United States* v. *Amsted Industries, Inc.*, 1974-2 Trade Cases ¶75,208 (N.D. Ill. 1974), exists primarily to assist members in competing with producers of non-asphalt products. *Amsted* affords little support for respondent's contention. There, other factors overshadowed the significance of the trade association, including a steadily dwindling market share for producers of cast iron pipe, considerable efforts by such producers to expand into other lines of pipe and the absence of any significant price advantage for cast iron products. In the face of such evidence, it may be appropriate to discount the importance of a trade association. By contrast, in this case the existence of a trade association, rather than conflicting with other evidence drawn from analysis of supply and demand considerations, bolsters the conclusion that asphalt and tar roofing products constitute a distinct market.

[21] *See General Foods* v. *FTC,* 386 F.2d 936 (3d Cir. 1967), *cert. denied* 391 U.S. 919 (1968); *United States* v. *Kennecott Copper Corp.*, 231 F. Supp. 95 (S.D.N.Y. 1964) *aff'd per curiam,* 381 U.S. 414 (1965).

respondent points out that some roofing products (*e.g.*, metal, clay, concrete) may be equally or more fire resistant than asphalt and tar, the latter have other advantages owing to greater architectural (I.D. 69; Tr. 1261–62) and structural (Tr. 470) flexibility. Slate, for instance, because of its weight, high transportation costs and localized production, is sold primarily in the Northeast. (Tr. 1238–40)

It is true that in particular areas (*e.g.*, the West Coast, Texas and Florida) sales of non-asphalt roofing [20] products, especially for residential purposes, command a greater share of the overall roofing market than they do in other areas. So too have there been efforts by non-asphalt roofing manufacturers to make products which imitate asphalt or tar roofing, and vice versa. (Tr. 1443, 1722, 2102–04) To illustrate, both JWC and Philip Carey were prompted to design asphalt shingles to compete with wood shakes in a premium market. (Tr. 1722, 1798–1802)[22] Yet, as one roofing contractor indicated, the price of asphalt shingles simulated to look like wood shakes was approximately twice that of a standard asphalt shingle. (Tr. 1443)

That some overlapping of competition has occurred in certain segments of the market does not negate the overall significance of asphalt and tar roofing products as an economically meaningful market. The boundaries of any product market are likely to be blurred to some degree on the fringes by cross-competition from substitutes. Here, the wide diversity of uses for which asphalt and tar roofing products can be used, including industrial and commercial applications, sets this industry off as a separate economic entity.

Supply side considerations play an important role in market analysis. If manufacturers can readily switch production from one product to another in response to changing market conditions, those products may be appropriately included in the same market.[23] Conversely, unique production facilities used in the manufacture of a product or class of products suggest that those products may properly be treated as a separate market for antitrust purposes.

In this case, the same basic machinery is used to manufacture all asphalt and tar roofing products, including saturated felts, roll roofing and shingles. The products are run on one continuous line with the termination point determining the end [21] product. The changes necessary to the production machinery to use tar instead of asphalt are not extensive (I.D. 95) and in Celotex' Perth Amboy, New Jersey and Chicago, Illinois plants tar felt is regularly run on the same machinery as asphalt felt. (Tr. 1503) Although additional alterations are required for the production of fiberglass-based

[22] The principal attraction of wood shakes and shingles is their aesthetic appeal. (Tr. 1869)

[23] *See Budd Co.*, 86 F.T.C. 518, 572 (1975).

asphalt roofing, they do not require major modifications (I.D. 95), and at least four major asphalt roofing firms also have fiberglass capability. (RX–53) One witness indicated that in order to run a fiberglass mat, as opposed to an organic mat, it would be necessary to remove the saturator, which accounts for about 20 percent of the existing equipment, and modify an additional 10 percent of the machinery. (Tr. 2142–43) The evidence further indicates that asphalt roofing companies generally produce only asphalt and tar roofing products. (I.D. 97)

In contrast, wood shakes and shingles, clay tiles, cement-asbestos shingles, cement tile, plastic shingles, metal shingles, slate, metal sheet roofing, rubber and plastic sheets, and all other forms of roofing materials must be produced on or by machinery which is completely different from that used to manufacture asphalt and tar roofing. (I.D. 96)

Whether allegedly competing products have distinct prices is a particularly significant issue in determining the bounds of the relevant market. Substantial price differences suggest that the cross-elasticity of demand among such products is relatively low, at least in the near term. In *Reynolds Metals Co.* v. *FTC*, 309 F.2d 223, 229 (D.C. Cir. 1962), the court stated: "We think price differentials have an important if not decisive bearing in the quest to delimit a submarket." The court there went on to find that a difference in price between florist foil at $.75–.85 a unit and decorative foil at $1.15–1.22 a unit was substantial enough to justify treating florist foil as a distinct submarket.

The record here shows that prices for asphalt and tar roofing, like florist foil, are separate and distinct from other kinds of roofing. The ALJ cited the following price ranges for different kinds of roofing products in two states, Illinois and Florida, to show the wide differential [22] in price between asphalt and non-asphalt roofing:[24]

	Illinois (Belleville/St. Louis)	*Florida* (Tampa)
Asphalt Shingles	$ 40 - $ 80	$ 40 - $ 90
Clay Tile	120 - 130	200 - 250
Slate	140 - 150	300 - 360
Wood Shingles	105 - 125	90 - 120

(Source: I.D. 93)

[24] The variations between the two states in the price of individual non-asphalt roofing products indicate the relatively greater impact of plant site location and transportation costs on these products. One witness pointed out that prices for such products as slate, wood shingles and clay tile drop substantially as a customer gets closer to the points of production. (Tr. 1641) The location of natural resources used in the manufacture of these products places greater constraints on pricing and distribution patterns than is true for asphalt roofing products.

Price data contained in respondent's exhibit, RX-73A, and compiled from testimony in the record, corroborates the fact that asphalt and tar roofing products are, for the most part, considerably more economical than other forms of roofing.[25]

[23] An examination of the average prices of asphalt shingles reveals a considerable disparity with the prices of the largest category of non-asphalt residential roofing products, wood shakes and shingles, even at their lower levels. Mr. McMurry of Celotex testified that average asphalt shingle prices were approximately $45–$55 (Tr. 1240), or about 56–68 percent of the lowest reported price ($80) for wood shingles. Where a similar price gap existed between insulated aluminum and copper conductors, the Supreme Court concluded that to ignore price under such circumstances was "to ignore the single, most important, practical factor in the business." *U.S.* v. *Alcoa*, 377 U.S. 271, 276 (1964). There is nothing in this proceeding that persuades us to follow a different course.

Respondent, however, argues that the price of roofing materials must be examined in terms of the installed cost per year over the life of the product, pointing to evidence that the lifespan of other roofing products is longer than for asphalt and tar roofing. The Commission and the Third Circuit specifically rejected a similar argument in *General Foods, supra*, with the court commenting as follows:

> Appellant, however, urges that the proper test is one of comparing the life expectancy of a 28 cent package of steel wool soap pads with the longevity of a similarly priced package of a non-steel wool product. We agree with the Commission's view that the very necessity of resorting to such estimates in order to compare prices tends, by itself, to demonstrate the distinctiveness of the prices of the household steel wool products. (*Id.* at 492)

For similar reasons, we reject that argument here as well. Rather than looking to lifetime costs in setting prices, the record indicates

[25] The following data derived from RX-73A are based on installed costs per 100 square feet:

Shingle and Tile Products	
* Asphalt Shingles	$ 40 - 90
Cedar Shingles/Shakes	80 - 120
Asbestos-Cement Shingles	90 - 110
Aluminum Shingles	100
Clay Tile	100 - 125
Cement Tile	60 - 100
Slate	140 - 360
Metal	25 - 250
Built-Up Roofing Products	
* Asphalt-Saturated (organic)	38 - 44
* Tar-Saturated (organic)	48 - 55
* Saturated Asbestos	47 - 53
* Fiberglass Sheet Elastomeric	38 - 43
	110 - 166

* Included in product market.

that the prime consideration for suppliers and customers alike at any given time was the price differential among competing asphalt roofing manufacturers. (I.D. 98, 100, 102–03) Further evidence that asphalt roofing prices are not particularly sensitive to changes in prices of other roofing products is suggested by price data prepared by respondent's economist depicting price trends for various roofing products between 1970 and 1975. (I.D. 104)

[24] Thus, weighing all of the evidence, especially the distinct methods of production and prices of asphalt and tar roofing products, we believe the record fully justifies the ALJ's finding that these products constitute a relevant market within which to assess the effects of the merger on competition. [25]

III. Geographic Market

The ALJ concluded that both the United States as a whole and a belt of 26 states (plus the District of Columbia) extending from Texas to Maine constitute relevant geographic markets for Section 7 purposes. (I.D. 114) In determining that a national market exists, the law judge noted that JWC and Panacon shipped their products to 47 and 42 states, respectively, in 1971, and that asphalt and tar roofing products are distributed nationally by the major firms. (I.D. p. 51) The contours of the area found by the judge to be an appropriate regional market for testing the effects of the merger encompass those states between Texas and Maine which lie wholly or substantially within a 250-mile radius of JWC and Panacon plants. (I.D. 111) The ALJ observed that this region was where the two companies had most of their plants, did the bulk of their business, and competed to a significant degree. (I.D. pp. 52–53)

Respondent contends that the ALJ erred in finding a national market. JWC asserts that the proper test for defining the geographic market is set forth by the Supreme Court in *U.S.* v. *Marine Bancorporation, Inc.*, 418 U.S. 602 (1974), and is "the area in which the goods or services at issue are marketed to a significant degree by the acquired firm." (*Id.* at 621) Respondent argues that this test has not been met since "there is nothing in the record and no finding to the effect that the Philip Carey Division 'marketed to a significant degree' in all 42 states." (RAB at 29)

Respondent likewise contests the regional market determination, claiming there is no evidence as to the economic significance of the proposed boundaries or any data, such as market shares or concentration ratios, which could be used to measure the competitive effect of the merger in the Texas-Maine region. Furthermore, JWC argues that since complaint counsel presented the case on the basis

of a national market, the law judge's determination violated due process and Section 5(b)(3) of the Administrative Procedure Act, 5 U.S.C. 554(b)(3).

We agree with the ALJ that the appropriate "section of the country" is the nation as a whole. As characterized by the Supreme Court, the relevant market must " 'correspond to the commercial realities' . . . of the industry and be economically significant." *Brown Shoe, supra,* 370 U.S. at 336–37 (footnote omitted). The Court has also described the relevant market as the area where "the effect of the [26] merger on competition will be direct and immediate." *United States* v. *Philadelphia Nat'l Bank,* 374 U.S. 321, 357 (1963).

Applying this test in the instant case, we believe the evidence clearly establishes the existence of a national market within which both JWC and Panacon were effective competitors. To begin with, the largest firms have widely scattered plants, sell their products throughout all or most of the United States, view themselves as national competitors and consider JWC and Panacon to be among their primary competitors. (I.D. 112: Tr. 580, 782–83) Likewise, JWC and Panacon distributed their products in the vast majority of states from plants situated in various parts of the country.[26] Further examination of such factors as transportation costs, shipping distances and consumption patterns reflect the interregional character of competition and point to the reality of competition on a national scale.

While transportation costs are an important consideration, the record reveals a number of other factors significantly influence the distance a product is shipped. (I.D. 106, 109) A representative of Johns-Manville, the fourth largest firm in the industry in 1972, testified that the geographic areas served by his firm's plants are determined by —

> The demand in the various markets, the ability of the producing plants to supply a given quantity, the manufacturing costs of the products, and the freight rates from the plants to reach the given areas.[27]

[27] That freight is not necessarily the most important element in the equation is reflected in the testimony of the President of Tamko

[26] Panacon plants were located in Houston, Tex.; Lockland, Ohio; Memphis, Tenn.; Perth Amboy, N.J.; and Wilmington, Ill. (I.D. 39) JWC had plants in Birmingham, Ala.; Fairfield, Ala.; Camden, Ark.; Chester, W.Va.; Chicago, Ill.; Edgewater, N.J.; Los Angeles, Cal.; Philadelphia, Pa.; and San Antonio, Tex. (I.D. 19).

[27] Tr. 796. To similar effect is JWC's response to the Commission's 6(b) request for a description of the company's marketing areas: "Market areas for the products produced by a given plant may vary from time to time and are generally determined and/or limited by a number of variables such as product availability, service, need for additional sales volume, manufacturing cost, freight absorption, competitors' activities and relative demand." (CX-70Z-76, *in camera*)

Asphalt Products, a manufacturer of asphalt roofing products in the Midwest and South:

> Q: As a matter of preference you prefer to sell closer to your plants?
> A: Oh, yes.
> Q: Do you direct your sales efforts to the area closest to your plant in order to avoid the freight charges?
> A: That is not critical, no.
> Q: Is it a factor?
> A: It is a factor. The most critical factor is to make the wheels turn.
> Q: Make sales?
> A: Keep the plant running.
> Q: For what purposes now?
> A: Simply because if the wheels aren't turning, then you have tremendous overhead and sales costs that are not being applied to any factor of roofing and that is more important than paying excess for the freight in my judgment. (Tr. 2006–07)

Although industry witnesses generally expressed a preference for shipping within a few hundred miles of a plant, shipping distances vary considerably among firms and with respect to individual plants. (I.D. 107, 109–110) For example, despite Panacon's desire to confine shipments as much as possible within a 250-mile radius of its plants (I.D. 111), shipment data shows that substantial output of several Philip Carey plants was shipped beyond that distance, [28] and at times considerably further.[28] In addition to the deliveries to Middle Atlantic states from the Lockland, Ohio plant (I.D. 111), the Memphis, Tennessee plant shipped 41 percent of its production (by value of shipment) in 1971 and 51 percent in 1972 to states completely outside the 250-mile range. (CX–70Z–37–38, 68–69, *in camera*) Philip Carey's Houston plant shipped 20.5 percent of its highest dollar volume product, strip shingles, to Arizona in 1971 and 22.5 percent in 1972. (CX–70X–33, 64, *in camera*) Similarly, Celotex' Los Angeles facility shipped 36.7 percent of its strip shingle output in 1972 to states outside California, mostly well beyond the 250-mile range.[29]

It is not particularly surprising that JWC and Panacon sell a large portion of their output in the eastern half of the United States and compete most intensely in that area. Since that part of the country is

[28] Tr. 423. Mr. Tennesson, the former president of Panacon, testified:
"We like to operate on the golden-circle concept by which we could make most of our sales as close as possible to our plants. Somewhere, I would say, around 250 miles was about the optimum. However, we did, in many instances, ship well beyond that distance particularly from the vicinity of the Lockland plant and the plant in Perth Amboy."

[29] CX–70Z–54, *in camera*. JWC's special report also confirms the interregional nature of competition in this industry. For example, their report indicates Philip Carey's Houston plant and JWC's San Antonio facility both competed with numerous firms in California. Philip Carey's Perth Amboy plant and JWC's Philadelphia plant both competed in Georgia and North Carolina, and Philip Carey's Houston plant and JWC's Los Angeles plant were both in competition with plants in Colorado and Utah. (CX–70A–77–82, *in camera*)

considerably more densely populated and industrialized, it can be expected to account for a large percentage of total demand for asphalt and tar roofing products. In fact, an examination of state-by-state shipments prepared for the Asphalt Roofing Manufacturers Association, reveals that about 67 percent of all [29] shipments of reporting firms in 1972 were to the 26 states and the District of Columbia where the ALJ found that JWC and Panacon had a significant competitive overlap and made a high percentage of their sales.[30] Although the percentage of industry shipments in the 26-state area is somewhat less than it is for JWC and Panacon (which made 78.1 and 86.7 percent, respectively, of their sales in these states),[31] there can be little doubt that these figures provide further proof that both firms were substantial factors in the major marketing areas of the country prior to their merger.[32] That they did not ship extensively [30] to all states does not lessen the significance of their presence on competition throughout the country. *See United States* v. *Jos. Schlitz Brewing Co.*, 253 F. Supp. 129, 134–5 (N.D. Cal. 1966), *aff'd* 385 U.S. 37 (1966), *rehearing denied* 385 U.S. 1021 (1967); *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 601 (S.D.N.Y. 1958); *Kennecott Copper Corp.* v. *FTC*, 467 F.2d 67, 71 (1972).

In view of the extensive shipments by JWC and Panacon throughout the country, and the substantial competition between these firms and other industry members in the major consuming areas of the country, we conclude that there is a national market for asphalt and tar roofing and that JWC and Panacon compete directly and substantially in this market. Whatever barriers freight costs pose to shipping asphalt and tar roofing long distances, factors other than transportation prevent sellers in one area from being insulated from competitive forces in other areas.[33] The industry's practice of absorbing freight charges by equalizing to the customer's nearest supplier further reflects the existence of interregional competition.

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[30] I.D. 111. The ARMA figures are derived from CX-4-13 and are based on unit shipments (in squares), rather than dollar volume, for roll roofing and shingles. Although ARMA data does not include all industry shipments, it provides a reasonable approximation of relative demand for asphalt and tar roofing products in various regions of the country. ARMA members account for about 85 percent of industry shipments. (I.D. 82)

[31] The figures for JWC and Panacon have also been calculated in terms of unit shipments (in squares) of roll roofing and shingles so as to correspond to the industrywide data cited above. As such, these percentages vary slightly from those shown in I.D. 111, which are based on the value of shipments and include felt products.

[32] By adding the seven surrounding states—Georgia, Florida, Oklahoma, Missouri, Iowa, Minnesota and Maine—to the 26-state region depicted in CX-14, the percentage of all shipments reported by ARMA within this expanded area rises to more than 83 percent. As CX-14 indicates, many JWC and Panacon plants were within close shipping range of large portions of these additional states and in fact the two firms made substantial shipments to some of them, thereby further underscoring the extent of their impact in a market which is national in scope.

[33] *See United States* v. *Bethlehem Steel Corporation, supra*, where the court cited legislative history in support of the proposition that the geographic market in merger cases "can include all areas where the trade in a product is affected by, and is not independent of, the trade in that product in other areas . . ." (footnote omitted). *See also* Bock, *Mergers and Markets*, 39, 42 (1960).

Even Dr. Lanzilotti, the economist called by respondent as an expert witness, agreed that the two firms were competing in a national market:

> Q: You talked yesterday about a national market and interregional competition?
> A: Yes.
> Q: Were the Philip Carey and Celotex Corporations in the national market? [31]
> A: I think that their plants were shipping varying distances within the U.S. from the different plants.
> Q: Do you consider them as part of a national market?
> A: Yes, I would consider them competing in the national market.
> Q: Would you consider them competing interregionally?
> A: Yes, they were shipping interregionally.
> Q: Would you consider that they are competing with each other?
> A: Yes, they were competing with each other.
> Q: Throughout the nation?
> A: Generally, I don't know that in each and every nook and cranny, in each and every village in the U.S., I don't recall that from memory. (Tr. 2478)

In *FTC* v. *Procter & Gamble Co.*, 386 U.S. 568, 571 (1967), the Supreme Court agreed with the Commission that a national market existed in the manufacture and sale of household liquid bleach, even though it was not feasible to ship the product more than 300 miles from its point of manufacture because of high shipping costs, and Clorox, the acquired firm, was the only company having plants located throughout the country. By contrast, in this case freight costs are less significant, interregional competition is substantial, and the merged partners ship throughout most of the country. National markets have also been found by the courts and the Commission in other cases notwithstanding distribution restrictions imposed by high transportation costs. *See, e.g., Kennecott Copper Corp.* v. *FTC, supra; United States* v. *Jos. Schlitz Brewing Co., supra; Bethlehem Steel, supra; British Oxygen Co. Ltd.*, 86 F.T.C. 1241 (1975), *rev'd on other grounds*, 558 F.2d 24 (2d Cir. 1977); *RSR Corp.*, 88 F.T.C. 800 (1976).

[32] Relying upon *Marine Bancorporation, supra*, respondent insists, however, that a national market is inappropriate since Panacon, the acquired firm, did not market its products "to a significant degree" in all 42 states that it shipped to in 1971. We disagree with respondent's characterization of the Court's holding in that case. Such an interpretation would lead to a rather mechanical, one-dimensional approach to market delineation which ignores commercial realities. Not only did *Marine Bancorporation* involve the issue of potential competition, thus making it logical that the Court would focus its analysis on the market in which the acquired firm participated, but the Court recognized that the unique nature of

banking services effectively seals off local markets from outside competitive forces. *Marine Bancorporation, supra* at 622. For individual or small commercial customers, factors of convenience and cost make it totally impracticable for them to turn elsewhere for their banking needs; on the supply side, legal restrictions on bank entry into new markets also serve to diminish to some degree whatever restraining influence the more distant producer may have on competition in the local market. We rejected a similar argument in *RSR, supra,* a case involving a factual context somewhat similar to the one here, noting that in the bank merger cases,

> [r]estriction of the permissible geographic market to the area of the country in which the acquired bank was marketing its services to a significant degree was thus underpinned by the economic realities of the situation. We do not believe that in taking the approach it did the Supreme Court meant to set forth a standard requiring that in widely differing industries economic realities justifying broader markets be ignored. (*Id.* at p. 886), n. 16)

In sum, the commercial realities present here lead us to conclude that the appropriate market for examining the competitive effects of the merger is national in scope. Furthermore, even if the geographical market in this case were to be measured exclusively by the area in which Panacon sold its products, we would reach the same result. While JWC distributed more widely than Panacon, the record evidence, including shipping data, [33] clearly indicates that both firms were competing in a national market.[34]

Having established a national market, we turn to the ALJ's finding that a regional market also exists, consisting of 26 states and the District of Columbia extending from Texas to Maine. Keeping in mind the Supreme Court's admonishment in *United States* v. *Pabst Brewing Co.,* 384 U.S. 546 (1966), that the relevant market need not be marked off by "metes and bounds," we are unable to conclude from the record which, if any, regional markets are appropriate for Section 7 purposes. Although JWC and Panacon shipped a substantial portion of their products within the proposed market, available data is insufficient, for example, to show the extent of shipments into and out of the area by other industry members, or to otherwise establish the degree to which competition within the region is insulated from outside competitive forces. Indeed, the economic feasibility of shipments by the two firms into surrounding states, the location of plants of other competitors within the region and

[34] Respondent appears to suggest there is some inconsistency in our issuance of a complaint and consent order involving another merger in this industry, *Bird & Son, Inc.,* 87 F.T.C. 411 (1976), wherein it is alleged that the relevant market is the Southeastern United States. (RAB at 29–30) That issue, of course, was never litigated and a host of decisions have found both national and regional markets to exist in a particular case. *E.g., United States* v. *Pabst,* 384 U.S. 546 (1966); *United States* v. *Bethlethem Steel Corp., supra.*

adjacent thereto, and ARMA shipment figures, by state, for the industry all suggest that the parameters of an appropriate regional market, or markets, might very well differ from the one selected by the ALJ.[35] Furthermore, there is no market share concentration data for measuring the effect of the acquisition in that region. For these reasons, we reject the ALJ's finding as to the regional market.[36] [34]

IV. Probable Effects on Competition

Having determined the relevant markets, our task is to ascertain whether the probable effect of the merger "may be substantially to lessen competition" in the asphalt and tar roofing industry. The ALJ found the acquisition violates Section 7 because it increased concentration in an already concentrated industry, eliminated an independent and vigorous competitor, and more firmly established JWC in the relevant product market.

Our analysis must commence with an examination of concentration in the relevant industry and the market shares possessed by the leading firms and parties to the merger. Statistical data relating to concentration levels and changes thereto resulting from a merger is easily obtained and often is the most objective information available about possible competitive effects. "Market shares are the primary indicia of market power," *United States* v. *Continental Can Co., supra,* 378 U.S. at 458, although the Court went on to note that a further examination of the structure, history and probable future of the applicable market would be necessary.

Under certain circumstances, concentration and market share data may alone suffice to establish illegality in the absence of convincing proof to the contrary. Thus, a merger is presumptively unlawful if it "produces a firm controlling an undue share of the relevant market, and results in a significant increase in concentration. . . ." *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 363 (1963). In *Continental Can, supra,* the Court reaffirmed its intention to rely primarily on market share data in such cases, stating that "[w]here a merger is of such a size as to be inherently suspect, elaborate proof of market structure, market behavior and probable anti-competitive effects may be dispensed with. . . ." (*Id.* at 458) Particular focus has been directed at two kinds of horizontal mergers: those which contribute to a trend toward concentration and those which increase, however slight, already high levels of

[35] In fact, the use of a national market probably favors respondent by broadening the scope of the comparative analysis. *Procter & Gamble Co.*, 63 F.T.C. 1465, 1561 (1963), *aff'd* 386 U.S. 568 (1967).

[36] In view of our resolution of the regional market issue we find it unnecessary to reach the due process argument raised by respondent.

concentration. As described in *United States* v. *General Dynamics,* 415 U.S. 486, 497 (1974),

> [t]he effect of adopting this approach to a determination of a "substantial" lessening of competition is to allow the government to rest its case on a showing of even small increases of market share or market concentration in those industries or markets where concentration is already great or has been recently increasing, since "if concentration is already great, the [35] importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." (citations omitted)

In *General Dynamics,* however, after a further examination of the "structure, history and probable future" of the coal industry, the Court concluded that despite high levels of concentration in the industry other factors justified the conclusion that the acquisition would not have the requisite anticompetitive effect.

As shown in the following table, the acquisition here combined the fifth largest firm in the industry, JWC, with 8.83 percent of the market, and the sixth largest firm, Panacon, with a market share of 8.79 percent. The resulting firm ranked second with a market share of 17.20 percent in 1972.[37] [36]

1971	*Market Share*	*1972*	*Market Share*
GAF	18.22%	GAF	18.50%
Certain-Teed	11.62	JWC	17.20
Johns-Manville	11.34	Certain-Teed	11.96
Bird & Son	10.59	Johns-Manville	11.56
JWC (Celotex)	8.83	Bird & Son	9.89
Panacon (Philip Carey)	8.79	Lloyd A. Fry	7.76
Lloyd A. Fry	7.89	Flintkote	5.38
Flintkote	5.50	U.S. Gypsum	2.55

(Source: CX-15B-C, *in camera*)

[37] I.D. 124, *in camera.* Respondent also attacks the validity of complaint counsel's 6(b) survey used in obtaining universe figures on the basis of errors in methodology and inclusion of inaccurate information. We are not persuaded by respondent's argument. The procedure employed here of surveying known firms and following up with questionnaires to additional competitors identified by those firms is a time-tested device for developing reliable aggregate industry shipment data. The survey universe exceeds that constructed from census data (I.D. 119, 122) and respondent does not cite to the exclusion of any domestic asphalt and tar roofing firms. There is also little significance in the failure to include imports in the statistical portrait since they amounted to no more than one percent of the domestic market in 1972. (I.D. 117) In short, we conclude that the size of the market depicted by the data is generally accurate. "[P]recision in detail is less important than the accuracy of the broad picture." *Brown Shoe, supra,* 370 U.S. at 342, n. 69. *See also Avnet,* 82 F.T.C. 391, 465 (1973), *aff'd* 511 F.2d 70 (7th Cir. 1975); *Papercraft Corp.,* 78 F.T.C. 1352, 1405–06 (1971), *aff'd* 472 F.2d 927 (7th Cir. 1973).

Two-firm, four-firm and eight-firm concentration ratios for 1971 and 1972 were as follows:

	2-firm	*4-firm*	*8-firm*
1971	29.84%	51.76%	82.78%
1972	35.70	59.21	84.78
Increase	5.86	7.45	2.00

(Source: CX-15B-C, *in camera*)

By combining two strong, viable competitors, with substantial market shares, the merger propelled JWC into the number two position, with a market share only slightly less than the industry leader, GAF Corp., and approximately 44 percent higher in relative terms than the third-ranked firm. The merger thus substantially increased both two- and four-firm concentration—by 5.82 percent and 7.45 percent, respectively—in an industry already experiencing high levels of concentration.[38]

[37] While the relevant market share figures here are not as high as those in *Philadelphia Nat'l Bank, supra,* the Court cautioned there that it was not attempting to specify the smallest market share which would threaten undue concentration, only that "30% presents that threat." (*Id.* at 364) Following *Philadelphia Nat'l Bank,* other mergers with somewhat lower combined market shares and concentration levels were also struck down in *United States* v. *Alcoa, supra,* and *United States* v. *Continental Can Co., supra.* In *Alcoa,* where the top five firms in the aluminum conducter market controlled 76 percent, Alcoa, the leading producer with 27.8 percent of the market, purchased Rome, the ninth ranking firm with 1.3 percent. Despite Rome's small market share, the Court concluded that the firm represented the type of "small but significant competitor" which Section 7 was designed to preserve. (*Id.* at 280–81) In *Continental Can,* 4-firm concentration in the combined container market stood at 63.7 percent prior to the merger of the number two firm, Continental, having a 21.9 percent market share, and Hazel-Atlas, the sixth ranking firm, with 3.1 percent. In finding that a *prima facie* anticompetitive effect had been established, the Court highlighted, among other concerns, the intrinsic effect of a merger between the second and sixth largest firms, the 14 percent increase

[38] Industry structure in this case, as depicted in the statistical data, generally conforms to the "tight oligopoly" model of Professors Kaysen & Turner in their well-known work, Antitrust Policy: An Economic and Legal Analysis 72 (1959). In the view of another commentator, the industry here can be viewed as one having a "high-moderate" degree of concentration, with characteristics just short of those industries classified as "highly concentrated." Bain, Industrial Organization, 139–41 (2d ed. 1968). Post-merger concentration is also well above the 40 percent, four-firm figure that Scherer suggests is the level at which "it is fair to assume that oligopoly is beginning to rear its head." Industrial Market Structure and Economic Performance 60 (1970).

in Continental's own market share which boosted its share to 25 percent, and the possibility that the merger might "trigger . . . other mergers by companies seeking the same competitive advantages . . . ." (*Id.* at 461, 464)

More recently, the Second Circuit in *Stanley Works* v. *FTC*, 469 F.2d 498 (2d Cir. 1972), *cert. denied*, 412 U.S. 928 (1973), agreed with the Commission's finding of a Section 7 violation involving a merger in the cabinet hardware market (top-4 concentration of 49–51 percent) between the tenth ranked firm, Stanley Works, with 1 percent of the market, and the leading manufacturer, Amerock Corp., with 22–24 percent. In dismissing the contention that Stanley's market share was *de minimus*, the court noted the firm's similarity to Rome as a significant independent competitor and concluded that:

> [t]he law is clear in its teaching that in an already concentrated industry with few sellers, in which the four leading companies dominate approximately 50% of the market, a merger involving the leading four, controlling 22-24% of the market, with a firm like Stanley, would seriously threaten substantial anticompetitive consequences. (*Id.* at 508)

[38] Just last year, in *Liggett & Myers, Inc.*, 87 F.T.C. 1074 (1976), *appeal pending* No. 76–1771 (4th Cir.), the Commission found a Section 7 violation where 4-firm concentration in the all dog food market increased from 54.44 percent before the merger to 59.01 percent thereafter. Eight-firm concentration rose on account of the merger from 71.96 percent to 76.54 percent. The merger combined the number four and six firms in the industry with market shares of 10.99 percent and 4.41 percent, respectively, into a number two firm controlling 15.76 percent. That decision, grounded as it was in large measure on statistical data, provides a close analogy to the facts in this proceeding.[39]

Measuring this case against the above decisions leads us to conclude that the market positions of JWC and Panacon before and after the merger, together with the substantial increase in concentration among the leading asphalt roofing companies, clearly suffice to establish a *prima facie* violation of Section 7. In *Alcoa* and *Stanley Works*, notwithstanding the relatively small market share of one party to the merger, the courts stressed the importance of preserving small viable competitors in concentrated markets where their presence might have a restraining influence on the conduct of the dominant firms. Yet the justification for preventing the disappear-

[39] *See also Warner-Lambert Co.*, 87 F.T.C. 812 (1976)(merger violated Section 7 in cough remedies market by combining firms with 4.4 and 4.2 percent of the market, respectively, and increasing 4-firm concentratio.. from 45 to 48 percent).

ance of a Rome or a Stanley from the market applies *a fortiori* to this case where both JWC and Panacon were major, well-established competitive factors in the relevant market. Eliminating Panacon from the scene removed not just a firm with the potential for eroding the market power of the leading firms at some time in the future; it foreclosed a substantial degree of existing competition involving a company having a direct and extensive presence in the market.[40]

[39] Moreover, with the exception of *Philadelphia Nat'l Bank,* the combination of JWC and Panacon increased two- and four-firm concentration more significantly than the other mergers. As a result, JWC leapfrogged from its sixth ranking position in the market to the number two slot. The disruptive effect of such a substantial merger is reflected in the relative market shares of the eight leading firms before and after the merger. Whereas in 1971 the spread in market shares between the number two and number eight firms was only 6.12 percent, that margin increased to 14.65 percent in 1972 following the merger. The impact of eliminating a competitor of Panacon's size is further revealed by the fact that the eighth ranking firm in 1972, U.S. Gypsum, had a market share of only 2.55 percent, less than half that of Flintkote, the number eight firm in 1971.

The heightened disparity among the leading asphalt roofing companies, with two firms rather than one commanding market shares substantially higher than their nearest rivals, poses the danger, described in *Continental Can, supra,* of triggering other mergers by firms intent upon keeping pace with the industry leaders. Indeed, that danger was more than a probability here. The record indicates that following JWC's acquisition of Panacon, two other mergers involving leading firms in the industry were consummated: fifth ranking Bird & Sons' acquisition of Logan-Long,[41] and the purchase by Flintkote (number seven in 1972) of two of the three plants of U.S. Gypsum, the eighth ranking firm in 1972. (I.D. 125) (CX-15B-C, *in camera*) While evidence is lacking as to the quantitative impact of these acquisitions on concentration levels, they do suggest the kind of spawning effect that may result if a merger of the size involved here is approved. [40]

[40] The anticompetitive effects of the merger here are exacerbated by the considerable overlap in competition between the two firms in the immediate marketing areas surrounding each of their plants. An examination of plant location (CX-14), shipping data (CX-70J-70Z74, *in camera*) and testimony of customers (I.D. 141-42) clearly reveals the extent to which JWC and Panacon were competing for each other's business. One scholar has suggested that in addition to proscribing mergers which substantially increase concentration, acquisitions of substantial competitors (with market shares of 5 percent or more) should also be banned because such firms are generally large enough to take advantage of production scale economics and usually are major factors in the market. Bok, "Section 7 of the Clayton Act and the Merging of Law and Economics," 74 *Harv. L. Rev.* 226, 327-29 (1960). Putting aside the increase in concentration which actually occurred, that test is more than met here.

[41] The Commission issued a consent order against Bird & Son, note 34, *supra,* requiring divestiture of one of the three plants acquired from Logan-Long.

It is also useful to bear in mind, as we noted earlier, *supra*, p. 2, that JWC's entry and growth in the asphalt roofing business have been achieved primarily through acquisition. Whatever justification exists as to those earlier acquisitions—first, the 1962 purchase of Celotex and its Los Angeles roofing plant, and later, the 1967 acquisition of Barrett Building Materials Division of Allied Chemical Corporation with its seven roofing plants—fails here in the context of this substantial horizontal merger. As the *Brown Shoe* Court pointed out, "expansion through merger is more likely to reduce available consumer choice while providing no increase in industry capacity, jobs or output. It was for these reasons, among others, Congress expressed its disapproval of successive acquisition." (*Id.* at 345, n. 72)

Thus, there is ample evidence in our view for concluding that the instant acquisition falls within that class of mergers deemed presumptively unlawful where concentration is already great, and "the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great" *Alcoa, supra*, 377 U.S. at 279. Concentration is undeniably high in the asphalt roofing market and the increase caused by the merger can hardly be characterized as slight.

The significance of the market share data in this case is further underscored when viewed alongside statistical evidence presented in a number of other cases involving mergers found unlawful under Section 7. Although those decisions were premised in part on evidence of a trend toward increasing concentration,[42] a comparison is useful to show the substantially higher market shares and concentration levels present here. [41]

For example, in *United States* v. *Von's Grocery*, 384 U.S. 294 (1966), market shares of the acquiring and acquired firms were 4.7 and 4.2 percent, respectively. There the acquisition boosted four-firm concentration from 24.4 percent to 28.8 percent, and increased the eight-firm ratio by 3.1 percent to 44 percent. The contrast with the pending case is rather striking. Similarly, in *United States* v. *Pabst, supra* where the Court found a violation of Section 7 in three separate markets, the combined share held by the two merging firms, Pabst and Blatz, was only 4.49 percent in the national market.

[42] The ALJ found a trend toward concentration in the asphalt roofing industry, citing the fact that six other mergers were consummated between 1969 and the time of trial, including the acquisitions by Bird & Son and Flintkote cited above. (I.D. 125) The absence of quantitative evidence demonstrating the effect of these mergers on concentration levels precludes us from ascertaining the precise dimensions of this trend. Nevertheless, we believe that acquisitions by major firms have a significant anticompetitive impact above and beyond the backdrop of a trend toward concentration in the industry. Temporal comparisons of concentration levels are helpful but unnecessary where the record shows, as it does here, that the market is already concentrated and the acquisition substantially enhances the share of one of the leading firms.

In the three-state market, Pabst's market share stood at 5.48 percent prior to the merger and Blatz held 5.84 percent. Ten-firm concentration in the national market stood at 45.06 percent in 1957, the year prior to the merger, and eight-firm concentration in the three state market was 58.93 percent in 1957. Even in the more highly concentrated Wisconsin market, four-firm concentration of 47.74 percent was somewhat lower than the level in the pending case. (*Id.* at 550–51)

The market share data in *Beatrice Foods Co.*, 86 FTC 1 (1975), *aff'd*, 540 F.2d 303 (7th Cir. 1976), also reveals a less concentrated market than is presented in the case now before us. The acquiring and acquired firms there possessed 7.6 and 2.3 percent, respectively, of the brush and roller market. As a result of the merger, four-firm concentration rose from 41.3 percent to 43.6 percent, after having increased from 36.6 percent in 1967, two years prior to the merger. In our recent decision in *American General Ins. Co.*, 89 F.T.C. 557, (1977), four-firm concentration in the fidelity bond market rose from 31.3 percent to 34.6 percent as a result of the merger; in the surety market concentration climbed from 30.6 percent to 35 percent. Combined shares of the merging firms in the two markets were 10.7 percent and 12.4 percent, respectively. Taken together, the effect of the merger and the pre-existing trend boosted concentration 8.65 and 9.64 percentage points in the two markets. JWC's acquisition of Panacon is well [42] within the statistical range established by these cases inasmuch as the acquisition itself increased four-firm concentration by 7.45 percentage points.[43]

However viewed, we can only conclude that the statistical evidence presented establishes a *prima facie* violation of Section 7. This conclusion is bolstered by JWC's own tendency to expand through acquisition as well as the acquisitions by other leading firms in the industry.

Unlike the defendant in *General Dynamics*, however, JWC has failed to present evidence pertaining to the structure, history, and probable future of the asphalt and tar roofing industry sufficient to overcome the presumption that the merger threatens a substantial lessening of competition. [43]

[43] Even the statistical data in *General Dynamics, supra*, which the Court indicated would have established a *prima facie* violation in the absence of countervailing factors, is not inconsistent with the figures in this case. There, the combined shares of the two firms at the time of the acquisition in 1959 were 12.4 percent. Although concentration in the Illinois market was somewhat greater than exists here, concentration in the broader Eastern Interior Coal Province market was less with a four-firm level of 43 percent before the merger. The increase in the share of the top two firms in the Province market in 1959 also is similar to that which occurred as a result of the JWC/Panacon merger: two-firm concentration in the Province market rose 4.8 percentage points to 37.9 percent; in contrast, two-firm concentration in the asphalt and tar roofing industry jumped as a result of the instant merger 5.86 percentage points to a level of 35.7 percent. (Id. at 495)

Respondent argues that no anticompetitive effects have resulted from the merger, citing testimony of its competitors and expert witness, Dr. Lanzilotti, that prices did not rise significantly and that smaller firms in the market have been successful. (RAB at 33) JWC also contends that low entry barriers, the entry of new firms in the market after the acquisition, the growth rate of smaller firms and the presence of potential competition provide further evidence that the merger will not adversely affect competition. We will take these arguments in turn.

The absence of any discernible effect on pricing[44] or the lack of small company failures attributable to the merger can be given little weight in analyzing the merger's probable effect on competition. At best such effects are difficult to measure, particularly if prices are already at non-competitive levels. Indeed, a high survival rate among firms on the fringe of the market may actually signal the existence of anticompetitive behavior, with smaller inefficient firms sharing some of the benefits derived from collusive arrangements among the industry leaders. *American General Ins. Co., supra,* 86 F.T.C. at 636.

More significantly, the merger's actual impact on competition is to a large extent within the control of the parties. As the courts and the Commission have repeatedly emphasized, if such evidence were allowed as a defense to a Section 7 suit, violators would be able to escape the law's reach by simply exercising restraint until the litigation is [44] concluded. So too, testimony by competitors must be viewed with skepticism since they may be interested in making acquisitions the legality of which could be affected by the pending suit. *See, e.g., General Dynamics, supra,* 415 U.S. at 504; *American General Ins. Co., supra,* 89 F.T.C. at 632–33. Futhermore, as the Court noted in *General Dynamics,* "the mere non-occurrence of a substantial lessening of competition in the interval between acquisition and trial does not mean that no substantial lessening will develop thereafter; the essential question remains whether the probability of such *future* impact exists at the time of trial." (*Id.* at 505) There is also no assurance that the state of competition following the merger is an accurate indicator of the competitive environment that would

[44] Dr. Lanzilotti, the economist called by respondent, testified that after factoring out cost increases due to higher petroleum prices and inflation, net prices for asphalt roofing rose only slightly during the period from early 1973 to mid-1975 (Tr. 2402–05; RX 94). Aside from the reservations noted below about relying on such pricing trends, and the fact that the figures were based upon estimated changes in cost rather than actual data, we have some concern regarding the foundation for Dr. Lanzilotti's conclusion that the net change in roofing prices was only 1.8 percent from March 1973 to August 1975. His assumption that asphalt represented 25 percent of the cost of asphalt roofing during this period is contradicted by first-hand testimony of an industry witness showing that when labor costs are properly included the percentage was as low as 15 percent. (Tr. 2237, 2239, 2406–2413) Reworking RX–94 using the 15 percent figure results in a net increase for roofing prices of 10.2 percent.

have existed but for the merger. *See FTC* v. *Consolidated Foods,* 380 U.S. 592, 598 (1965).

As for entry barriers, the ALJ found that the principal hurdle is the capital investment required for production facilities. Such factors as patents, technology, trained personnel and advertising do not appear to pose significant obstacles to would-be entrants. (I.D. 126, 132–33) Insofar as capital costs are concerned, the record reveals some divergence among industry witnesses as to the cost of an efficient size plant. For example, the Board Chairman of Bird & Son (Mr. Jenkins) testified that the kind of roofing plant his firm would build would cost about $6.75 to $7 million, with an additional $7.5 to $8 million required for a felt mill. (I.D. 127) Another estimate provided by Mr. Snow of Johns-Manville was somewhat higher—$8 to $10.35 million for a roofing plant, with the higher figure including production of both fiberglass and organic based asphalt roofing products, and $12 to $15 million for a dry felt mill. (CX–71, *in camera;* Tr. 711–12, *in camera*) Perhaps a more reliable cost indicator is the $9 to $12 million estimate for Celotex' Goldsboro, N.C. plant, a combination roofing/felt facility completed after the acquisition of Panacon. (I.D. 129; Tr. 1825)

Yet, representatives of smaller firms in the industry testified that their companies successfully built facilities for as little as $1.8 million in one instance (Consolidated Fiberglass), and $2.4 million in another (Tamko), excluding the cost of adding felt (or fiberglass mat) production capacity and additional lines. (I.D. 130) Although the ALJ concluded that it was not essential that a firm produce its own felt (I.D. 131), most firms have such capacity (CX–2,3) [45] and it is not clear whether supplies are readily available from non-roofing sources.[45] In fact, Tamko had a felt plant (Tr. 1987), the cost of which was unspecified, and Consolidated at the time of trial was planning to construct a fiberglass mat facility. (Tr. 2261–62) In describing the plans for Panacon's proposed Hopewell, Va. roofing plant, which would not have had a felt mill, the former president of Panacon indicated that "an optimum roofing plant has a paper [or felt] mill and a roofing plant together." (Tr. 468)

Apart from the cost of individual plants, there is also disagreement as to the advantages and disadvantages of single- vs. multi-plant operations. (I.D. 136) While small one-plant firms may have some advantages over their larger rivals, as the ALJ noted, there is evidence that multi-plant locations enable the latter to penetrate the

[45] While Mr. DiSalvo, a vice president of Celotex, testified that non-roofing firms, such as paper companies, can produce roofing felt (Tr. 1727–30), he also acknowledged that the asphalt roofing industry, including those members with felt capacity, periodically experiences shortages of dry felt. (Tr. 1817–19)

major markets more effectively through expanded capacity, more direct access to customers and relative savings in distribution costs. (Tr. 432, 1396) Further, given the fluctuations in housing demand, both seasonally and regionally, multi-plant capability would appear to afford manufacturers greater flexibility in responding to shifting market conditions. The importance of multi-plant capability is reflected by the fact that the 8 largest firms in the industry all have multi-plant operations (CX–68) and own more than 70 percent of the asphalt and tar roofing plants in the United States. Such an industry structure is consistent with Professor Scherer's conclusion that "multi-plant operation is a crucial contributor to high concentration." *Industrial Market Structure, supra* note 38, at 93.

The record, on balance, however, affords only a rough estimate of the costs associated with *de novo* entry. More precise comparisons of the relative cost advantages of different size plants and/or firms were not provided. Nevertheless, in our view the resource commitment required for a new entrant to challenge the major firms successfully on a national scale is not insignificant. Though perhaps not high, entry barriers here are at least in the moderate range. More importantly, relative ease of entry and the concomitant [46] prospects for potential competition are not a substitute for the loss of substantial actual competition. As we have said before, "even proof of low entry barriers . . . can be at most of slight exculpatory value in the face of probable anticompetitive effects, since all it suggests is that such effects may be smaller or shorter lived, not that they are unlikely to occur." *RSR, supra,* 88 F.T.C. at 289.[46]

Respondents also advance a related argument by contending that actual entry by several new firms, both before and after the merger, satisfactorily rebuts any inference of probable anticompetitive effect based on the market share data alone. There have been eight new entrants in the industry since 1960, including two subsequent to the JWC-Panacon acquisition. (I.D. 137) There is no evidence, however, that these new firms have eroded the market position of the industry leaders. Their combined market share in 1972 was 3.9 percent, with only one company, Royal Brand, having a share in excess of 1 percent of the market. Nor has the entry of the two firms after the acquisition had a significant impact. (I.D. 138, *in camera*) Although respondent points to the faster growth rate of the smaller firms during 1970–72 as further evidence that the instant merger is

[46] Respondent's assertion that the large number of potential entrants serves to nullify any anticompetitive effect is likewise rejected since it is highly unlikely that potential competition would restore the actual competition eliminated by this acquisition. *Ekco Products Co.*, 65 F.T.C. 1163, 1207–08 (1964), *aff'd*, 347 F.2d 745 (7th Cir. 1965); *Beatrice Foods Co.* 67 F.T.C. 473, 718 (1965); *American Brake Shoe Co.*, 73 F.T.C. 610, 684 (1968), *modified* 77 F.T.C. 148, (1970).

unlikely to have any anticompetitive effects, we do not draw the same conclusion. Although market shares of the leading firms dropped slightly during this period, overall concentration increased and sales of four of the top eight firms rose faster than overall industry sales. (CX-15A-C, *in camera;* RX 83) Given an expanding market,[47] the rise in sales of smaller firms is not particularly surprising. And, as noted earlier, the success of smaller firms could also be facilitated by an umbrella of weakened competition resulting from the high levels of concentration in the market.

Thus, we find nothing in the record here that contradicts the *prima facie* case established by the statistical data. We conclude, therefore, that the acquisition has the probable effect of substantially lessening competion in violation of Section 7 of the Clayton Act. [47]

V. The Remedy

Noting that the appropriate remedy for a Section 7 violation is to "restore competition to the state of health it might have enjoyed but for the acquisition," the ALJ ordered divestiture of the stock and assets of Panacon's Philip Carey Division, while rejecting complaint counsel's request for total divestiture of the Panacon assets. The ALJ determined on the basis that the roofing and non-roofing lines of the Panacon business are severable and inclusion of the latter is not essential to the viability of the roofing operation. The law judge also turned down complaint counsel's call for a mandated "spin-off" of the acquired assets, expressing instead a preference that the divestiture be accomplished by sale of each Philip Carey plant as a going concern to separate buyers. Finally, the law judge disagreed with complaint counsel that divestiture of Celotex' Goldsboro, North Carolina plant (under construction at the time of the acquisition) was necessary to compensate for the plant that Panacon contemplated building in Hopewell, Virginia. On appeal, Commission counsel renew their request for a spin-off of the Panacon assets, including the Goldsboro plant.

Respondent, for its part argues that the relief granted by the ALJ is excessive and not reasonably related to the violation. If any relief is granted in this matter, respondent urges that the maximum corrective action should be a five-year injunction against future acquisitions without prior Commission approval. To support its claim, respondent relies on the Commission's decision in *National Tea Co.,* 69 F.T.C. 226 (1966), and a series of consent agreements.

[47] Shipments rose 58 percent between 1970 and 1972—a substantial figure even after taking inflation into account.

We agree with the ALJ that divestiture is the proper remedy in this case. As we have said previously, "[t]he most appropriate remedy to redress a Section 7 violation is generally divestiture. It is specified in the enforcement provisions of the amended Clayton Act and normally commends itself as a rational course in restoring competition to the condition which obtained prior to the merger." *Diamond Alkali Co.*, 72 F.T.C. 700, 742 (1967). Divestiture is particularly desirable where, as here, the Section 7 violation is premised in part on the elimination of a substantial independent competitor. No other form of relief can compensate for such loss as well as the restoration of that competitive force in the market. [48]

It is also clear that a ban on future acquisition, by itself is inadequate.[48] Unlike *National Tea,* barriers to entry here are not so low as to obviate the need for something stronger than a merger ban to restore competition. To the contrary, the fact that entry by a few small firms has not diminished the market power of the leading firms in the asphalt and tar roofing industry suggests that it will take some time before natural market forces can replace the competition lost by the acquisition of Panacon. More importantly, actual, or horizontal, competition was involved in only a fraction of the store acquisitions in *National Tea,* not to mention the enormous difficulties inherent in the divestiture of 485 stores. *National Tea, supra* at 266. We believe, however, that in addition to divestiture the record of this case, particularly as it indicates respondent's history of growth in this industry by acquisition, justifies a 10-year ban on further acquisitions by JWC in the asphalt and tar roofing industry.

We also concur in the ALJ's conclusion that it is not essential to mandate divestiture of all the Panacon assets in order to remedy the violation of Section 7 that has occurred here. While it is certainly within our power to order divestiture of assets unrelated to the asphalt roofing business, particularly if such action is needed to assure the viability and attractiveness to would-be purchasers of the divested entity, the evidence indicates that reestablishing the original Panacon operation is unnecessary. Complaint counsel's assertion that only a restored Panacon can provide sufficient diversification to afford corporate earnings stability is undercut. Philip Carey's record as part of Panacon, and prior thereto, suggests that it can be successfully operated on an independent basis. Indeed, complaint counsel in their proposed findings paint a bright picture of the Philip Carey operation, noting that it has been in the roofing

[48] Respondent's reliance on negotiated consent orders is likewise inappropriate. Each consent order was negotiated in light of the facts of the case at hand and the likelihood of success if litigation were pursued. Such orders have no bearing on the type of order which the Commission can impose when it finds that Section 7 has been violated.

business for nearly a century, produces more than 200 different building and industrial products, and in terms of profitability contrasts favorably with the losses experienced by Briggs Manufacturing Company before their merger and the formation of Panacon. (CPF 32–50) Even after creation of Panacon, [49] there is evidence that Philip Carey contributed more to the profitability of the parent firm than did its merging partner. (CPF 37; Tr. 440) Under Panacon, Philip Carey operated as a separate profit center with a separate sales force and separate plants. (RPF I–A 8–12) For these reasons, we decline to order divestiture of the former Panacon organization in its entirety.

We do, however, include within our divestiture order the assets of Carey-Canadian Mines, Ltd., a former subsidiary of Panacon engaged in asbestos mining operations in the Quebec area. This operation supplied between 40 and 55 percent of Philip Carey's asbestos fibre requirements during the four years preceding the acquisition by JWC. (CX–39P) Conversely, Philip Carey's purchases accounted for approximately 13 percent of the total value of fibre sales by Carey-Canadian in 1971. (CX–39S) While the availability of alternate sources of supply or the volume of Philip Carey's business dependent on these supplies is unclear, inclusion of Carey-Canadian is relevant to the line of commerce in question here and should assist in the restoration of Philip Carey as a viable competitive force in the market.

Turning to complaint counsel's call for a spin-off of the divested entity, we agree with the ALJ that a spin-off of JWC stockholders should not be the only permissible form of divestiture. Notwithstanding the desirability of having an independent Philip Carey reestablished, the difficulties involved in spin-offs plus the possibility that purchase by a non-roofing firm might expedite Philip Carey's successful reentry into the market persuade us that a more flexible divestiture order should be issued.

As for complaint counsel's request for divestiture of Celotex' Goldsboro, N.C. plant, we are not convinced such action is necessary to assure a viable new Philip Carey. As we have noted, *supra,* plans for Philip Carey's Hopewell, Va. plant were abandoned by JWC after the merger in view of its ongoing construction of the proximate Goldsboro facility. Nevertheless, the former president of Panacon testified that the Hopewell plant would have been built in a "very cheap fashion" and would have had a significantly smaller capacity than JWC's Goldsboro plant and no felt mill. (Tr. 442, 467–69) Given the lack of evidence in the record as to the significance of the

Hopewell facility to Philip Carey, we see no compelling basis for divestiture of the Goldsboro plant. [50]

Our order here requires divestiture of the Philip Carey and Carey-Canadian assets as a going concern, rather than through piecemeal sale of the individual plants as recommended by the ALJ. While we have no quarrel with the proposition that more, rather than fewer, competitors would be desirable, our choice of relief is dictated by the fact that we have found a violation of Section 7 in the nation as a whole, rather than in smaller submarkets. We repeat our earlier observation that an effective challenge to the major firms in the industry requires a large, multi-plant operation capable of doing business on a national scale. Even were that not essential, there is nothing in the record which enables us to evaluate the prospects of each plant operating successfully as an independent going concern. Not only does output among the plants vary considerably but there are also differences in the age and product mix of the various plants. (CX-39U) An infusion of outside capital, of course, might readily correct whatever deficiencies, if any, may exist; but it is likely that the efforts (in time and cost) required to make five separate firms as effective as one unified company will assist JWC and other leading firms to entrench further their positions in this already concentrated market.

An appropriate order is appended.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of respondent from the initial decision, and upon briefs and oral argument in support thereof and opposition thereto, and the Commission for the reasons stated in the accompanying opinion having determined to deny the appeal of respondent:

It is ordered, That the initial decision of the administrative law judge, pages 1-64 be adopted as the findings of fact and conclusions of law of the Commission, except to the extent inconsistent with, and as indicated in, the accompanying opinion.

It is further ordered, That the following order to divest and to cease and desist be, and it hereby is, entered: [2]

I

It is ordered, That respondent Jim Walter Corporation (hereinafter "JWC"), a corporation, and its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns, divest all stock, assets, title, properties, interests, rights and

privileges, of whatever nature, tangible and intangible, including without limitation all buildings, plants, equipment, machinery, raw material reserves, inventory, customer lists, trade names, trademarks, and other property of whatever description, of the Philip Carey Company and Carey-Canadian Mines, Ltd., both divisions of Panacon Corporation ("Panacon") acquired by JWC through its wholly-owned subsidiary the Celotex Corporation ("Celotex"), as a result of the acquisition of the stock of Panacon, together with all additions and improvements which have been made thereto. Such divestiture shall be absolute, shall be accomplished no later than one (1) year from the effective date of this order, shall restore the Philip Carey Company and Carey-Canadian Mines, Ltd. as a going concern and effective competitor in the asphalt and tar roofing industry, and shall be subject to the prior approval of the Federal Trade Commission.

II

It is further ordered, That pursuant to the requirements of Paragraph I, none of the stock, assets, properties, rights, privileges and interests of whatever nature, tangible or intangible, acquired or added by Celotex or JWC shall be divested, directly or indirectly, to anyone who is at the time of the divestiture an officer, director, employee or agent of, or under the control, direction or influence of JWC or Celotex or any other subsidiary of JWC or Celotex or anyone who owns or controls, directly or indirectly more than one (1) percent of the outstanding shares of the capital stock of JWC or any of its subsidiaries or anyone who is not approved in advance by the Federal Trade Commission.

III

It is further ordered, That pending any divestiture, the assets and business specified in Paragraph I shall be maintained and operated as a separate corporation with separate books of account, separate management, separate assets, and separate personnel. [3]

IV

It is further ordered, That pending any divestiture required by this order, JWC shall not cause nor permit any deterioration of the assets and business specified in Paragraph I in a manner that impairs the marketability of any such assets and business.

V

It is further ordered That, for a period commencing on the effective date of this order and continuing for ten (10) years from and after the date of completing the divestiture required by this order, JWC shall cease and desist from acquiring directly or indirectly or through subsidiaries, joint venture, or otherwise, without the prior approval of the Federal Trade Commission, the whole or any part of the stock, share capital or assets, any interest in or any interest of any domestic concern, corporate or non-corporate, engaged in the manufacture, production, sale or distribution of any asphalt or tar roofing product; nor shall JWC or its subsidiaries enter into any arrangement with any such concern by which JWC or its subsidiaries obtain the market share, in whole or in part, of any such concern in the above described product line.

VI

It is further ordered, That, as used in this order, the acquisitions to which Paragraph V pertains include any arrangements by JWC with any other party (1) whereby such other party discontinues the manufacture of any asphalt or tar roofing product under a brand name or label owned by such other party and thereafter distributes any of said products under any JWC, or its subsidiaries', brand names or labels, or (2) whereby such concern discontinues its participation in the asphalt and tar roofing industry and thereafter transfers to JWC, or its subsidiaries, its customer lists or in any other way makes available to JWC its customers or customer accounts. [4]

VII

It is further ordered, That on the first anniversary date of the effective date of this order and on each anniversary date thereafter until the expiration of the prohibitions in Paragraph V of this order, JWC shall submit a report in writing to the Federal Trade Commission listing all acquisitions, mergers and agreements to acquire or merge made by JWC or its subsidiaries; the date of each such acquisition, merger or agreement; the products involved and such additional information as may from time to time be required.

VIII

It is further ordered, That within thirty (30) days from the effective date of this order and every sixty (60) days thereafter until it has

fully complied with Paragraph I of this order, JWC shall submit a verified report in writing to the Federal Trade Commission setting forth in detail the manner and form in which it intends to comply, is complying or has complied therewith. All such reports shall include, in addition to such other information and documentation as may hereafter be requested, (a) a specification of the steps taken by JWC to make public its desire to divest the interests described in Paragraph I of this order, (b) a list of all persons or organizations to whom notice of divestiture has been given, (c) a summary of all discussions and negotiations together with the identity and address of all interested persons or organizations, and (d) copies of all reports, internal memoranda, offers, counteroffers, communications and correspondence concerning said divestiture.

IX

It is further ordered, That JWC shall notify the Commission at least thirty (30) days prior to any proposed changes which may affect compliance obligations arising out of the order, such as dissolution, assignment or sale resulting in the emergence of successor corporations, and that this order shall be binding on any such successor.

Chairman Pertschuk not participating.

IN THE MATTER OF

PORTER & DIETSCH, INC., ET AL.

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 9047. Complaint, July 29, 1975 — Final Order, Dec. 20, 1977

This order, among other things, requires a St. Paul, Minn. distributor of non-prescription drugs, its Chicago, Ill. advertising agency, and a Seattle, Wash. drug store chain to cease making unsubstantiated claims or misrepresenting that products contain a unique ingredient, or that users of weight control products can achieve weight loss without restricting their caloric intake or limiting their choice of foods. Further, the firms are required to include prescribed disclosure statements in promotional materials for products containing certain ingredients, and to recall all advertising data disseminated during the past two years for X-11 tablets.

Appearances

For the Commission: *Dean A. Fournier* and *William H. Patton.*

For the respondents: *Albert A. Carretta,* Washington, D.C. and *Jerold W. Dorfman,* New York City for Porter & Dietsch, Inc., et al. and *Michael Rayton,* Seattle, Washington for Pay'n Save Corporation.

COMPLAINT

The Federal Trade Commission, having reason to believe that Porter & Dietsch, Inc., a corporation, and William H. Fraser, individually and as an officer of said corporation, and Kelly Ketting Furth, Inc., a corporation, and Joseph Furth, individually and as an officer of said corporation, and Pay'n Save Corporation, a corporation, hereinafter sometimes referred to as respondents, have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

PARAGRAPH 1. Respondent Porter & Dietsch, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its office and principal place of business located at 2453 University Ave., St. Paul, Minnesota. Respondent William H. Fraser is president of said corporation. He formulates, directs and controls the policies, acts and [2] practices of this corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of said corporation.

Respondent Kelly Ketting Furth, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 400 North Michigan Ave., Chicago, Illinois. Respondent Joseph Furth is an officer of said corporation and formulates, directs and controls certain acts and practices of this corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of said corporation.

Respondent Pay'n Save Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its office and principal place of business located at 1511 Sixth Ave., Seattle, Washington.

PAR. 2. For purposes of this complaint, the term "commerce" shall mean commerce as defined in the Federal Trade Commission Act.

PAR. 3. Respondents Porter & Dietsch, Inc. and William H. Fraser are now and have been engaged in the packaging, advertising, offering for sale and sale of various products at wholesale and retail levels. Among such products is a non-prescription preparation which comes within the classification of "drug" (as that term is defined in the Federal Trade Commission Act) and which has the following designation, directions for use and active ingredients:

Designation: "X-11 Tablets"

Dosage:

One tablet three times daily, one-half hour before each meal.

Active Ingredients:

Vitamin A	1388.0 U.S.P. units
Vitamin B	0.5 mg.
Vitamin B_2	0.5 mg.
Vitamin B_6	1.0 mg.
Vitamin C	15.0 mg.
Calcium Pantothenate	1.0 mg.
[3]Niacinamide	5.0 mg.
Vitamin E	5.0 int. units
Vitamin B_{12}	0.5 mg.
Phenylpropanolamine Hydrochloride	25.0 mg.
Methylcellulose	25.0 mg.
Caffeine	25.0 mg.

PAR. 4. Respondent Kelly Ketting Furth, Inc. is now and has been the advertising agency of Porter & Dietsch, Inc. Respondent Joseph Furth is now and has been the account executive in such agency responsible for advertising of products marketed by Porter & Dietsch, Inc. As such, these respondents have prepared and placed for publication advertising material, including but not limited to the advertising referred to herein, to promote the sale of the aforesaid preparation and other products. In the course and conduct of their business, and at all times mentioned herein, these respondents have been and are now in substantial competition, in or affecting commerce, with other corporations, firms and individuals in the advertising business.

PAR. 5. Respondent Pay'n Save Corporation operates a chain of drug and sundries stores in Washington, Oregon, Alaska, California, Hawaii, and Canada. Said respondent is now and has been engaged in the advertising, offering for sale and sale of various products including the aforesaid preparation.

PAR. 6. In the course and conduct of their business, respondents Porter & Dietsch, Inc. and William H. Fraser ship, distribute and cause to be shipped and distributed the aforesaid preparation from their place of business in the State of Minnesota to retail stores and purchasers located in various other States of the United States.

In the course and conduct of its business, respondent Pay'n Save Corporation operates retail stores and storage warehouses in several States of the United States. Said respondent causes the aforesaid preparation to be shipped from Minnesota to storage points and Pay'n Save stores located in various other states, for sale to the general public.

In the further course and conduct of their businesses, and using means and mechanisms of commerce, these respondents and respondents Kelly Ketting Furth, Inc. and Joseph Furth cause advertisements for said preparation to be published in media of interstate circulation. [4]

Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in the aforesaid preparation and advertisements, in or affecting commerce.

PAR. 7. In the course and conduct of their businesses, respondents have disseminated, and caused the dissemination of, certain advertisements concerning said preparation by the United States mail and by various means in or having an effect upon commerce, including but not limited to advertisements inserted in newspapers, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparation; and have disseminated

and caused the dissemination of advertisements concerning said preparation by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparation in or having an effect upon commerce.

PAR. 8. Typical of the statements and representations in said advertisements, but not all inclusive thereof, are the following:

Eat well . . . and lose that fat! – without ever missing a meal . . .

* * * * * * *

You eat 3 satisfying balanced meals a day – plus snacks. You eat what you want . . .

* * * * * * *

You do not deny yourself.

* * * * * * *

. . . Laboratory Science has perfected a Tiny Tablet for EASY REDUCING . . . clinic-tested ingredients . . .

* * * * * * *

I lost 80 pounds! When I started on the X-11 Reducing Plan, I weighed 205 pounds. Now my weight is down to 125 pounds. I enjoy wearing dresses sizes 11 or 12's, rather than size 20 1/2 . . .

* * * * * * *

Part of the secret of this method is a unique ingredient . . . which puts a "brake" on your cravings for sweets, candy, pastries, rich gravies.

USED TO WEIGH 160 LBS.
NOW I'M DOWN TO 105
says Mrs. George Stowe
Canon, Georgia
"I started on the X-11 Plan and started losing weight almost right away. I am so grateful . . . I recommend the X-11 Plan to everyone I see. It's wonderful."
I LOST OVER 40 LBS.
says
Mrs. Beverly Tellier
Chula Vista,
California
"I used to weigh over 170 lbs. Now I'm less than 125 lbs. and going down. I have recommended your plan to a lot of people because they just couldn't believe the results."
Mrs. George Stowe says:
"I am 25 years old and here are my before-and-after measurements . . ."
WAS AM
WEIGHT 160 lbs. 105 lbs.
HEIGHT 5-2½ in. 5-2½ in.
DRESS SIZE 18 8
BUST 38 in. 34 in.
WAIST 29 in. 24 in.
...and
I LOST OVER
40 LBS., TOO
says Mrs. Ken Schmidt
Norfolk, Nebraska
"When I started on the X-11 Reducing Plan, I weighed 180 lbs. Now I'm under 125. I enjoy wearing dresses sizes 11 - 12's rather than 20½. It's good to know there's a way to lose ugly fat and keep my weight at a level I dreamed of holding."
X-11 REDUCING PLAN
FROM GEORGIA TO NEBRASKA TO CALIFORNIA
AMERICAN WOMEN HAVE FOUND A WAY
THAT REALLY HELPS OFF THAT UGLY FAT
No Starvation Dieting - No Strenuous Exercise
RESULTS ARE GUARANTEED - OR MONEY BACK
Here, at last, is that wonderful kind of plan that offers you a way to help get rid of 5, 10, 25 or more pounds of unsightly fat. Not by suffering thru starvation dieting hunger . . . not by sticking to boring reducing diets . . . not by extra-tiring exercises . . . not by any of the humdrum methods you have known and given up.
Now . . . Lose Ugly Fat . . . and don't go to bed hungry. The X-11 Plan is not a crash or starvation diet. That's because X-11 is the proved and sound method, used from one end of America to the other, to curb the appetite and still eat 3 satisfying, sensible meals a day.
Laboratory Science has perfected a tiny pre-meal tablet with a plan that lets you eat 3 sensible meals a day, pure "brush meal" [illegible].
42 Tablets
3.00
105 Tablets
5.00
OR MAIL COUPON:
EAT WELL ...and lose that Fat.
You will eat, satisfying meals and snacks, but you won't be the prisoner of the overeating habit. If you aren't 100% delighted, return your first package for an immediate refund — no questions asked.
PAY 'n SAVE
AVAILABLE AT ALL STORES
Mail to: PAY 'n SAVE DRUGS — Dept. AD.
1611-6th AVE., SEATTLE, WASH. 98101
Please send me ..... Packages of X-11
☐ 42 Tablets at $3.00 (Plus 16c. Sales Tax)
☐ 105 Tablets at $5.00 (Plus 24c Sales Tax)
PLEASE PRINT YOUR NAME AND ADDRESS BELOW:
Name
Address
City State Zip
☐ Cash enclosed ☐ Money Order ☐ Check enclosed
GUARANTEE — You must be 100% delighted with results of your first package or your money will be refunded — no questions asked.

[6] PAR. 9. Through the use of said advertisements and others similar thereto but not specifically set out herein, respondents have represented and are now representing, directly or by implication, that:

A. Users of X-11 tablets can lose weight without restricting their accustomed caloric intake and while they continue to eat the foods of their choice.

B. Respondents have a reasonable basis from which to conclude that substantially all users of X-11 tablets will lose a significant amount of weight.

C. The X-11 tablet contains a unique ingredient.

PAR. 10. In truth and in fact:

A. Users of X-11 tablets cannot lose weight without restricting their accustomed caloric intake nor while they continue to eat the foods of their choice. In fact, each X-11 package includes a diet highly restricted as to calories and choice of foods, which must be adhered to if weight loss is to be achieved.

B. Respondents have no reasonable basis from which to conclude that substantially all users of X-11 tablets will lose a significant amount of weight.

C. The X-11 tablet does not contain any unique ingredient.

PAR. 11. Several of the advertisements described and alluded to in Paragraph Eight hereof include testimonials reciting weight reduction and other figure improvements purportedly attained by lay users of the aforesaid preparation, when such stated results do not reflect the typical or ordinary experience of consumers with said preparation under circumstances similar to those depicted in the advertisements. These advertisements do not disclose or identify such typical or ordinary experience in any way. Thus, respondents have failed to disclose in their advertising a material fact which, if known to consumers, would be likely to affect their consideration of whether or not to purchase said preparation. [7]

PAR. 12. Respondents have marketed and advertised X-11 tablets without disclosing in the advertising thereof that persons with high blood pressure, heart disease, diabetes or thyroid disease should use said preparation only as directed by a physician. Inasmuch as a substantial number of overweight persons are suffering from one or more of said physical conditions, respondents have failed to disclose in their advertising a material fact which, if known to such persons, would be likely to affect their consideration of whether or not to purchase said preparation.

PAR. 13. Respondents have marketed and advertised the "X-11 Reducing Plan" without disclosing in the advertising thereof that a

highly restricted caloric diet is an integral part of said plan. Such fact, if known to consumers, would be likely to affect their consideration of whether or not to purchase said product. Thus, respondents have failed to disclose a material fact in their advertising.

PAR. 14. The advertisements referred to in Paragraphs Eight, Eleven, Twelve and Thirteen were and are misleading in material respects, as alleged in Paragraphs Ten, Eleven, Twelve and Thirteen, and constituted, and now constitute, "false advertisements," as that term is defined in the Federal Trade Commission Act, and the statements, representations and omissions described in Paragraphs Nine, Eleven, Twelve and Thirteen were and are misleading, deceptive and unfair acts or practices.

PAR. 15. The use by respondents of the aforesaid misleading, deceptive and unfair statements, representations, acts and practices, and the dissemination of the aforesaid "false advertisements," have had and now have the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said statements and representations were and are true and complete, and into the purchase of substantial quantities of X-11 tablets by reason of said erroneous and mistaken belief.

PAR. 16. In the course and conduct of their businesses, and at all times mentioned herein, respondents Porter & Dietsch, Inc., William H. Fraser and Pay'n Save Corporation have been and now are in substantial competition, in or affecting commerce, with corporations, firms and individuals in the sale of products and services for weight reduction. [8]

PAR. 17. The aforesaid acts and practices of respondents including the dissemination of "false advertisements," as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices in commerce and unfair methods of competition in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act.

Commissioner Thompson dissenting.

DISSENTING STATEMENT OF COMMISSIONER MAYO J. THOMPSON

JULY 29, 1975

I share the majority's view that the principal distributor of an alleged weight-reducing pill ought to be able to substantiate the claims he makes for it and that, if it is in fact dangerous for people with heart disease, diabetes, high blood pressure, and other diseases

to take it, he ought to say so in his ads. But I cannot agree with my Brethren that a *retailer* with no involvement in the preparation of the ads in question should be subjected to liability here.

The advertisements in question are prepared by the distributor of these pills, Porter & Dietsch,[1] with the actual copy being written by its president and controlling owner, Mr. William H. Fraser. Advertising mats are prepared and sent out to the major regional and local drug chains, including Pay'n Save Corporation, a Seattle-based drug retailer with some 90 stores located in five (5) states. The distributor pays for approximately 90 percent of the cost of these ads, with the cooperating retailer paying the remaining 10 percent. Since the messages are directed to the ultimate consumer and generally exhort him to buy from the drug chain, it is the latter's name rather than that of the distributor which appears in the ads.

Why pick on Pay'n Save? Other drug chains have been similarly "involved," including Fred Meyer (Portland); Western Drug (Montana); Pay Less (Tacoma); Skaggs and Grand Central Stores (Boise); Tiffany [2] Drugstores (Eugene, Oregon); Drug Fair (Washington, D.C.); and Walgreens (Chicago). The staff explains the selection of Pay'n Save by simply noting that it is the largest of the participating chains in the Pacific Northwest. (The investigation was conducted by our Seattle regional office.) In other words, Pay'n Save was the most *convenient* retailer target.

It is conceded that Pay'n Save "had a significantly lower level of involvement" in the ads than Porter & Dietsch and its president, Mr. Fraser, but the staff believes this factor is more than outweighed by the need to establish a new legal precedent. An "important aspect of this case," the staff tells us, "is the inclusion of the advertising retailer, Pay'n Save Corporation, as a named respondent." A retailer who *uses* a deceptive ad, we're told, ought to be held just as liable as the fellow who created it in the first place. Had Pay'n Save made a "thoughtful" examination of the packages in question, including the disclosures on the package insert, it would have known something was wrong.

The problem, the staff reports to us, is that the country's retailers have been getting away with murder in this area. While "major general-merchandise retailers are frequently involved and/or specifically identified as the advertiser in highly questionable ads devoted to a single product, our research has disclosed no clearcut instances of such retailers being held responsible for manifestly deceptive product claims appearing in such ads. Subjection of Pay'n Save to

[1] Porter & Dietsch is the "exclusive national distributor" of this product, the "X-11" reducing pill.

the 'cease and desist' provisions of this order will help to reestablish this responsibility principle in the context of this type of advertising."

So there we have it. The staff wants to establish a new principle of trade regulation law. *Any retailer who runs an ad prepared by a supplier is legally liable for the truthfulness of everything in it.* Never mind that he didn't participate in the preparation of the ad and that it would be economically prohibitive for [3] him to maintain a staff of scientists and lawyers to screen all the supplier ads that a substantial retailer is confronted with in the course of a business year. In short, strict "no-fault" liability. Run the ad at your peril.

I think the Commission is embarking on an unwise, dangerous, and unnecessary course of action here. It is unwise because it defies common sense. It is dangerous because it imposes an intolerable cost burden on the nation's retailers that can only be passed on to the consumer in the form of still more inflated prices than those we now labor under. And it is unnecessary because a cease and desist order that stops the development of deceptive advertisements at the headwaters clearly makes it unnecessary to seine all the downstream tributaries.

I would dismiss Pay'n Save from this complaint.

Initial Decision by Daniel H. Hanscom, Administrative Law Judge

May 21, 1976

I

Statement of the Case

ALLEGATIONS OF COMPLAINT

The complaint in this proceeding charged respondents Porter & Dietsch, Inc., William H. Fraser, Kelly Ketting Furth, Inc., Joseph Furth and Pay'n Save Corporation with the dissemination of false advertisements and unfair, misleading and deceptive statements and representations in the advertising, promotion and sale of X-11 tablets in violation of Sections 5 and 12 of the Federal Trade Commission Act.[1] More specifically, the complaint alleged that respondents disseminated advertisements which misrepresented,

[1] Then Commissioner Thompson dissented from the naming of Pay'n Save Corporation, a large West Coast drug chain, as a respondent in this proceeding on the grounds, *inter alia*, that he could not agree that "a *retailer* with no involvement in the preparation of the ads in question should be subjected to liability here," and that Pay'n Save was being singled out among many drug store chains, as "the most *convenient* retailer target." See statement issued with the complaint.

directly or by implication, that "[u]sers of X-11 tablets can lose weight without restricting their accustomed caloric intake and while they continue to eat the foods of their choice," that respondents had a "reasonable basis from which to conclude that substantially all users of X-11 tablets will lose a significant amount of weight," and that each "X-11 tablet contains a unique ingredient."

The complaint further alleged that some of respondents' advertisements included testimonials reciting weight reduction and other figure improvements purportedly attained by lay users of the "aforesaid preparation" which did not reflect the "typical" or "ordinary" experience of consumers "under circumstances [3] similar to those depicted in the advertisements." Failure of the advertisements to disclose or identify the typical or ordinary experience of persons using the tablets was alleged to constitute a failure to disclose a material fact which, if known, would have affected the consumer's consideration of "whether or not to purchase said preparation."

The complaint also alleged that respondents "marketed and advertised X-11 tablets without disclosing in the advertising thereof that persons with high blood pressure, heart disease, diabetes or thyroid disease should use [them] only as directed by a physician," and that in doing so respondents failed to disclose a material fact in such advertising. Finally, the complaint charged that the "X-11 Reducing Plan" was marketed and advertised without disclosing that "a highly restricted caloric diet [was] an integral part of said plan," and that such constituted a failure to disclose a material fact.

RESPONDENTS' ANSWERS

Respondents filed answers denying most of the substantive allegations of the complaint, and raising a number of affirmative defenses. Respondents Porter & Dietsch, Inc., William H. Fraser, Kelly Ketting Furth, Inc., and Joseph Furth denied that they ever marketed a product designated "X-11 Tablets," contending that they were engaged in the sale of the "X-11 Reducing Plan" which "includes for ingestion tablets having the ingredients set forth in Paragraph Three of the Complaint." The foregoing respondents also denied representing that "users of X-11 tablets can lose weight without restricting their accustomed caloric intake and while they continue to eat the foods of their choice," and denied representing "that substantially all users of X-11 tablets [would] lose a significant amount of weight." Respondents contended that they had advertised [4] only the "X-11 Reducing Plan," not tablets and represented only that users of the "X-11 Reducing Plan" would lose some weight, and

that they had a reasonable basis for this assertion. Lack of public interest also was urged.

Respondent Pay'n Save maintained that it received the prepared X–11 advertisements from Porter & Dietsch, Inc., and therefore "cannot be held liable for the truthfulness of representations made therein by others."

Prior to the completion of evidentiary hearings respondents Porter & Dietsch, Inc., William H. Fraser, Kelly Ketting Furth, Inc. and Joseph Furth filed an amended answer contending that the Federal Trade Commission is "precluded from bringing this proceeding . . . under the principles of collateral estoppel and/or stare decisis." Respondent Pay'n Save likewise filed an amended answer contending that "Complaint Counsel is precluded from bringing this proceeding under the principles of res judicata, collateral estoppel and/or stare decisis." According to respondents, three litigated decisions, *Alleghany Pharmacal Corporation,* 75 F.T.C. 990 (1969), *Hanover House* and *Romar Sales,* proceedings before the Postal Service,[2] preclude trial in this proceeding of issues relating to the "safety and efficacy of phenylpropanolamine as an appetite suppressant for weight reduction."

PROCEDURAL HISTORY

Complaint was served on the various respondents between the end of August and early September 1975. On September 10, the law judge issued an order directing counsel to attempt agreement on a timetable for completion of prehearing matters and a date and place for hearings on the merits. Thereafter, at the request of counsel for Porter & Dietsch, Inc., William H. Fraser, Kelly Ketting Furth, Inc., and Joseph Furth, a prehearing conference was held on October 7, 1975, [5] and a timetable was issued the following day setting hearings on the merits to commence January 6, 1976.

The parties disagreed as to the location of hearings. After considering all submissions, the law judge ordered that hearings be held in Seattle, Washington, where Pay'n Save Corporation and its counsel[3] and a number of witnesses and complaint counsel were located, and in Washington, D.C., to take the testimony of East Coast witnesses. Hearings in Chicago, Illinois, to accomodate Porter &

[2] *Hanover House* and *Romar Sales Corp.*, P.S. Dkt. Nos. 2/143 and 2/149, decision of December 5, 1975.

[3] Original counsel for Pay'n Save Corporation withdrew on October 2, and Albert A. Carretta, counsel for Porter & Dietsch, Inc., William H. Fraser, Kelly Ketting Furth, Inc., and Joseph Furth, took over as counsel for all respondents. However, on October 28, Mr. Carretta withdrew as counsel for Pay'n Save Corporation because of a possible conflict of interest between that respondent and one or more of the other respondents. Original counsel for Pay'n Save Corporation then reentered the proceeding.

Dietsch, Inc., William H. Fraser, Kelly Ketting Furth and Joseph Furth were also offered if requested by those respondents.[4]

In the meantime, Porter & Dietsch, Inc., William H. Fraser, Kelly Ketting Furth, Inc., and Joseph Furth moved on September 24, 1975, for a "Corrective News Release" and a stay of the date for filing an answer on the ground that the Commission's News Release failed to contain the usual caveat that the Commission issues a complaint when it has "reason to believe" that the law has been violated, and that such action did not imply adjudication of the matters alleged. This motion for a "Corrective News Release" was certified to the Commission recommending that it be granted, but the request for a stay of the date for filing an answer was denied. On October 17, 1975, the Commission granted the motion for such correction. [6]

Thereafter, discovery and various other pretrial proceedings continued. The law judge issued a number of subpoenas requiring the production of documents and information by respondents, directed the production of specified Commission materials, ordered the taking of certain depositions and disposed of a variety of motions. Included among the latter were a motion and supporting memorandum of Porter & Dietsch, Inc., William H. Fraser, Kelly Ketting Furth, Inc., and Joseph Furth to "Dismiss Complaint Before Trial For Lack Of Public Interest Sufficient To Justify Issuance Of A Cease And Desist Order" and their motion and supporting memorandum for a "Supplementary Corrective News Release." The latter motion was certified to the Commission with a recommendation pursuant to §3.22 of the rules and was denied by the Commission on December 19, 1975.

Respondent Pay'n Save Corporation also filed a motion to "Dismiss Complaint Before Trial Or, In The Alternative, For Summary Decision" which was supported by a memorandum filed by Porter & Dietsch, Inc., William H. Fraser, Kelly Ketting Furth, Inc., and Joseph Furth. This motion was denied by the law judge on December 30, 1976.

On December 23, 1975, all respondents filed an action in the U.S. District Court for the District of Columbia seeking a declaratory judgment and restraint of further proceedings in this matter. They alleged that a cease and desist order against them would not be in the public interest, that the Commission's News Releases were improper, and that the scheduling of hearings in Seattle and Washington, D.C., rather than in one location "convenient to all parties," violated the due process clause of the Fifth Amendment,

[4] On December 29, 1975, counsel for respondents formally declined hearings in Chicago, Illinois, and evidentiary hearings were not held at this location.

the Administrative Procedure Act and the Commission's rules. On January 5, 1976, after hearing oral argument, the District Court denied respondents' motion for a preliminary injunction and thereafter dismissed the complaint. [7]

Hearings on the merits commenced in Seattle, Washington, on January 7 and concluded in Washington, D.C., on January 26, 1976, 8 actual hearing days having been utilized during that period. The record consisting of 220 exhibits, many of them multi-paged, and 1,405 pages of transcript was closed by order of the law judge on February 10. Twelve witnesses testified including the individual respondents and an official of Pay'n Save Corporation, and the testimony of three witnesses was entered in the record by stipulation. Complaint counsel called four medical or scientific experts, Drs. Margen, Drenick, Prout and Sorer, and respondents Porter & Dietsch, Inc., William H. Fraser, Kelly Ketting Furth, Inc., and Joseph Furth called three, Dr. Fineberg, a medical doctor, Dr. Silverman, a pharmacologist, and Dr. Hoebel, a specialist in physiological psychology.

At the conclusion of the case-in-chief respondents orally moved to dismiss on the ground that complaint counsel had not made out a prima facie case (Tr. 1038–97). Ruling was deferred by the law judge until decision on the entire case after all evidence had been received, and permission was granted to respondents to reduce their motion to writing supporting it with record references and legal authority. On March 29, 1976, respondents (except Pay'n Save) filed a comprehensive written motion to dismiss with a separately bound appendix in support. This motion will be referred to hereinafter as "Motion to Dismiss" and will be ruled upon in this Initial Decision in accordance with the findings, discussion and conclusions set forth.

This matter is now before the undersigned for decision based upon the allegations of the complaint, the answers, the evidence and the proposed findings of fact, conclusions and legal authority filed by all parties. All proposed findings of fact, conclusions and arguments, including those in the Motion to Dismiss, not specifically found or accepted herein, are rejected. The law judge, having considered the entire record, and all the contentions of the parties, makes the following findings and conclusions and issues the order set out at the end hereof: [8]

II

FINDINGS OF FACT

RESPONDENTS

1. Respondent Porter & Dietsch, Inc. (Porter & Dietsch), is a Minnesota corporation with its office and principal place of business in St. Paul. It is engaged in the packaging and sale of pharmaceutical products, principally by mail and through retail drug stores (Ans. P&D, ¶1; Fraser, Tr. 753–54). Porter & Dietsch has sold its X–11 tablets since 1967 (Ans. P&D, ¶3; Fraser, Tr. 769, 823) and, although a few other products are sold, the tablets are by far its largest volume item, amounting to over 80 percent of all sales (Fraser, Tr. 757–61).

2. Individual respondent William H. Fraser is the president and sole owner of Porter & Dietsch (Fraser, Tr. 753–54). As such, Mr. Fraser formulates, directs and controls the policies, acts and practices of corporate respondent Porter & Dietsch (Ans. P&D, ¶1).

3. In the course and conduct of their business, Porter & Dietsch and William H. Fraser have been and now are in substantial competition in or affecting commerce (as "commerce" is defined in the Federal Trade Commission Act) with other corporations, firms and individuals in the sale of products and services for weight reduction (Ans. P&D, ¶16).

4. Respondent Kelly Ketting Furth, Inc. (Kelly Ketting Furth) is an advertising agency incorporated in Illinois, with its office and principal place of business in Chicago (Ans. P&D, ¶1). Since its organization in 1968, Kelly Ketting Furth has been, and is, the advertising agency for Porter & Dietsch in the marketing of X–11 tablets (Ans. P&D, ¶4; Fraser, Tr. 805; Furth, Tr. 927–32). [9]

5. Individual respondent Joseph Furth is a vice-president of Kelly Ketting Furth and is the advertising account executive for respondent Porter & Dietsch (Ans. P&D, ¶4; Furth, Tr. 927–36). Mr. Furth participates in the management of Kelly Ketting Furth and is among those responsible for the formulation, direction and control of its acts and practices, including those alleged in the complaint (Ans. P&D, ¶1).

6. In the course and conduct of their business Kelly Ketting Furth and Joseph Furth are now, and have been, throughout the period that Kelly Ketting Furth has been the advertising agency for Porter & Dietsch, in substantial competition in or affecting commerce (as "commerce" is defined in the Federal Trade Commission Act) with

other corporations, firms and individuals in the advertising business (Ans. P&D, ¶4).

7. Pay'n Save Corporation is a Washington corporation with its headquarters located in Seattle. It is a major chain of retail drug and sundry stores with outlets located principally in the Northwest and in northern California with some stores in Alaska and Hawaii (Ans. P&D, ¶¶ 1 and 5). Gross sales volume for the 12-month period ending November 1, 1975, was approximately $290,000,000 (Stipulation, Tr. 435). Porter & Dietsch's X-11 tablets have been sold by Pay'n Save since 1969 (Ans. P&D, ¶5; Palmer, Tr. 507-08).

8. In the course and conduct of its business and throughout the period of its marketing and/or advertising of Porter & Dietsch's X-11 tablets, Pay'n Save has been and now is in substantial competition in or affecting commerce (as "commerce" is defined in the Federal Trade Commission Act) with other corporations, firms or individuals in the sale of various products, including products sold as aids in weight reduction (Ans. P&S, ¶¶ 2, 4, 5). [10]

X-11 TABLETS

1. *Nature and sales*

9. Porter & Dietsch purchase the X-11 tablets they market from the manufacturer in polyethylene pouches containing 21 tablets each. These pouches are then packaged in cartons of two sizes - one box containing two (2) pouches totaling 42 tablets and a larger size containing five (5) pouches totaling 105 tablets (Fraser, Tr. 769-70). The smaller box is normally sold at retail for $3.00 and the larger size for $5.00 (Adm. P&D, No. 9b; CX 36, 39, and 62). In addition to the tablets, each box contains a leaflet providing directions for the purchaser in using the tablets and some advice about obesity, a rudimentary low-calorie diet for a 5-week period, a "calorie value chart" for a limited number of foods, a weight chart and a "warning" against use by individuals with certain physical conditions unless medically supervised (CX 37 and 40). The outside of the box containing the X-11 tablets features in bold lettering "X-11 Reducing Plan" and the headline "EAT WELL!! — and LOSE THAT FAT" (CX 36, 38, 39 and 41). The ingredients, the "adult dose," and a "Caution" (warning) are also provided.

10. X-11 tablets were, and are, advertised and marketed extensively throughout the United States as a reducing aid or preparation for the obese, and for those who wish to shed what they consider to be excess body weight. Approximately 80 percent of all retail chain stores in the nation sell X-11 tablets (Fraser, Tr. 783), and annual

sales for the year ending April 30, 1975, were in the area of $1,789,000 (Fraser, Tr. 759–61). Each X–11 tablet contains 25 milligrams of phenylpropanolamine, 25 milligrams each of methylcellulose and caffeine and vitamins A (1388 U S P units), B_1 (0.5 mg), B_2 (0.5 mg), B_6 (1 mg), C (15 mg), calcium pantothenate (1 mg), niacinamide (5 mg), E (5 int. units), and B_{12} (0.5 mcg) (Ans. P&D, ¶3). The ingredients in the X–11 tablets allegedly conducive to weight loss are phenylpropanolamine and methylcellulose. The former is an [11] amphetamine-related compound, which is claimed to act as an appetite suppressant. The characteristics of phenylpropanolamine will be considered in subsequent findings dealing with the representations contained in respondents' advertising. Methylcellulose is also represented in the marketing of X–11 tablets as an aid to weight loss, and the characteristics of this substance will also be considered.

11. The promotional approach of respondents with respect to phenylpropanolamine and methylcellulose in marketing X–11 tablets is illustrated by statements in an advertisement given wide circulation in *TV Guide* for October 18 through 24, 1975, which stated under a picture of two fingers holding a pill adjacent to the headline "WHAT EACH TABLET CONTAINS" (CX 13):

> 25mg METHYLCELLULOSE A pure vegetable extract which expands and is intended to give one a feeling of being fuller.
>
> 25mg PHENYLPROPANALOMINE [sic] An appetite depressant intended to help give one the feeling of a restricted appetite.

(See also CX 69–73 and 90–91.) Other advertisements hold out the effects purportedly attributable to methylcellulose and phenylpropanolamine, i.e., a feeling of fullness and depressed appetite, without specifically identifying these substances (CX 4–8, 10, 14–15, 43, 46–47, 50, 52–56, 59, 61, 63–64, 67–68, 74, 77–80, 82–85 and 87–88).

2. *Respondents were engaged in the advertising and sale of diet tablets*

12. Respondents place great emphasis on their contention that they neither marketed nor advertised "tablets" but, rather, a "plan." Insofar as this [12] contention involves a defense that representations were not made to the public in respondents' advertisements as to the characteristics and qualities of the X–11 tablets, and the weight losses achievable from their use, it is contrary to the evidence and is rejected. Respondents' advertisements, directly and by implication, conveyed the net impression to the public that a

"wonder" preparation for easy weight reduction – the X–11 tablets – was available. The advertisement in the *Seattle Times* September 10, 1972, reprinted herein, is illustrative (CX 18). This advertisement begins with the banner headline "X-11 IS HERE!" and then tells readers who are overweight and want to reduce that they can "EAT WELL. . .AND LOSE THAT FAT! – without ever missing a meal." Weight losses of 5, 10, 25 or more pounds are represented, "GET RID OF 5, 10, 25 OR MORE POUNDS!," as achievable with X–11 tablets. A picture of an attractive and trim lady is given prominence who is quoted as saying "I LOST 80 LBS!" The advertisement announces to the overweight reader that you "satisfy your appetite while you take off pounds and inches" without "strenuous exercises" and "without starvation dieting hunger," that "[Y]ou do not deny yourself," and that "you lose weight. . .while you eat well." How is all this accomplished? The advertisement answers: "here's why" — a *tablet* which:

1. COUNTERACTS HUNGER

Take one of these tablets a half-hour or so before your regular meals. It combines a pure vegetable extract that has no calories, and quickly starts acting to provide the feeling of a fuller, satisfied, contented stomach. You eat 3 satisfying balanced meals a day – plus snacks. You eat what you want, but eat less because you don't feel so hungry throughout the day.

(Paid Advertisement)

X-11 IS HERE!

Eat well ...and lose that Fat!

-without ever missing a meal...

GET RID OF 5, 10, 25 or MORE POUNDS!

Now you can satisfy your appetite while you take off pounds and inches with the X-11 Reducing Plan. You take off [illegible] weight without strenuous [illegible] without starvation dieting hunger. You do not deny yourself. In fact, you enjoy three sensible satisfying meals every day while you get rid of that unsightly, excess, flabby fat. No longer will you be the prisoner of the [illegible] because you eat less, want [illegible] lower weight ... while you eat [illegible]. And here's why!

1 COUNTERACTS HUNGER

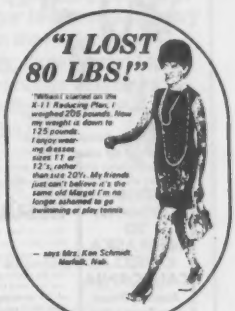
Take one of these tablets a half-hour or so before your regular meals. It combines a pure vegetable extract that has no calories, and quickly starts acting to provide the feeling of a fuller, satisfied, contented stomach. You eat 3 satisfying, balanced meals a day – plus snacks. You eat what you want, but eat less. Because you don't feel so hungry throughout the day.

2 ACTS AS AN APPETITE APPEASER

Part of the secret of this method is a unique ingredient that acts as a beneficial appetite appeaser, which puts a "brake" on your cravings for sweets, candy, pastries, rich gravies. High-Fat / High Calorie foods – anything. It helps you conduct a kind of psychological warfare with yourself as you break some bad old eating habits you probably thought you were stuck with forever. Thus, your appetite is appeased while you take off fat.

3 FORTIFIED WITH VITAMINS

Important! Just a few of these tablets and you'll feel your lot to feel jumpy, jittery, or fagged out when dieting. Your daily supply now combines a whole spectrum of vitamins and to help prevent these nutritional deficiencies.


"I LOST 80 LBS!"
"Before I started on the X-11 Reducing Plan, I weighed 208 pounds. Now my weight is down to 125 pounds. I enjoy wearing dresses sizes 11 or 12's, rather than size 20½. My friends just can't believe it's the same old Margel I'm no longer ashamed to go swimming or play tennis.
– says Mrs. Ken Schmidt
Norfolk, Neb.

SATISFACTION GUARANTEED OR MONEY BACK

If [illegible] tablets and establish "first weight" within your [illegible] the X-11 Reducing Plan, just return the empty package for an immediate refund. No questions asked.

HURRY IN FOR THE X-11 REDUCING PLAN – OR MAIL COUPON.

X-11

Mail to PAY 'N SAVE DRUGS
1511 6th Ave., Dept. AD, Seattle 98101

Please send me ____ packages of X-11 Tablets.
☐ 42 tablets, at $3.00 ☐ 105 tablets, at $5.00
Add 40c for fast and handling. Add 85c for fast and handling.

PLEASE PRINT your name and address below

Name .....
Address .....
City ..... State ..... Zip .....

☐ Cash enclosed ☐ Money order ☐ Check enclosed
GUARANTEE—You must be delighted with results of your first package or your money will be refunded—no questions asked.

42 Tablets—$3.00
105 Tablets-$5.00

PAY 'n SAVE

AVAILABLE AT ALL STORES

THE SEATTLE TIMES Sunday, September 10, 1967

Advertisement

I USED TO WEIGH 160 LBS. NOW I'M DOWN TO 105

says Mrs. Georgia Sisk of Canon, Georgia

"I started on the X-11 Plan and started losing weight almost right away. I am so grateful . . . I recommend the X-11 Plan to everyone I see. It's wonderful."

I LOST OVER 40 LBS.

says Mrs. Beverly Tellier Chula Vista, California

I used to weigh over [illegible] Now I'm less [illegible] lbs. and proud of it. I have received [illegible] of people [illegible] they could do it [illegible]

Mrs. [illegible] Sisk says:

I [illegible] and now my [illegible] measurements

	WAS	AM
WEIGHT	160 lbs.	105 lbs.
HEIGHT	5 2½ in.	5 2½ in.
DRESS SIZE	18	8
BUST	38 in.	34 in.
WAIST	29 in.	24 in.

...and I LOST OVER 40 LBS., TOO

says Mrs. Ken Schmidt Norfolk, Nebraska

When I started on the X-11 Reducing Plan I weighed 180 lbs. Now I'm under 125. I enjoy wearing dresses size 11 - 12's rather than 20's. It's good to know there's a way to lose ugly fat and keep my weight at a level I dreamed of holding.

FROM GEORGIA TO NEBRASKA TO CALIFORNIA American Women Have Found A Way That Really Helps Off THAT UGLY FAT

No Starvation Dieting - No Strenuous Exercise

RESULTS ARE GUARANTEED - OR MONEY BACK

Here, at last, is that wonderful kind of plan that offers you a way to help get rid of 5, 10, 25 or more pounds of unsightly fat. Not by suffering thru starvation dieting hunger pains not by sticking to boring reducing diets not by extra tiring exercises . . . not by any of the humdrum methods you have known and given up.

Now . . . Lose Ugly Fat . . . and don't go to bed hungry. The X-11 Plan is not a crash or starvation diet. That's because X-11 is the proved and sound method, used from one end of America to the other, to curb the appetite and still eat 3 satisfying, sensible meals a day.

EAT WELL ...and lose that Fat.

You will eat, satisfying meals and snacks, but you won't be the prisoner of the overeating habit. If you aren't 100% delighted, return your first package for an immediate refund . . . no questions asked.

X-11 REDUCING PLAN

42 Tablets 3.00
105 Tablets 5.00

OR MAIL COUPON:

Mail to PAY 'n SAVE DRUGS—Dept. AD
1511 - 6th AVE., SEATTLE, WASH. 98101

Please send me ..... Packages of X-11
☐ 42 tablets at $3.00 ☐ 105 tablets at $5.00
(Plus 10¢ Sales Tax) (Plus 3¢ Sales Tax)

PLEASE PRINT YOUR NAME AND ADDRESS BELOW

Name _____

Address _____

City _____ State _____ Zip _____

☐ Cash enclosed ☐ Money Order ☐ Check enclosed

GUARANTEE: You must be 100% delighted with results of your first package or your money will be refunded no questions asked.

PAY 'n SAVE

AVAILABLE AT ALL STORES

THE SEATTLE TIMES Sunday, July 8, 1973 Pictorial 31

9/9
Sept. 8-10, 1973 The Idaho Statesman 5

Eat Well...and Lose That Fat!

AN EFFECTIVE PLAN TO LOSE UGLY FAT

NOW...LABORATORY SCIENCE HAS PERFECTED A TINY PRE-MEAL TABLET WITH A PLAN THAT LETS YOU ENJOY FOODS YOU CHOOSE

X-11

This unique formula—now at easy-to-use tablet form—with the X-11 Reducing Plan helps lose excessive weight, reduce inches. Don't go hungry. Eat 3 normally square meals a day with just one tablet

So you want to lose 5, 10, 25 or more pounds of excessive weight? . . . Here now is an extraordinary easy figure-slimming Plan that offers you a way to get rid of unsightly, superfluous fat you're carrying—without strenuous exercises . . . and, most important of all, without missing a meal.

EAT AND LOSE THAT EXCESSIVE WEIGHT. You can satisfy your appetite and peel off those extra pounds, too. Now, with the X-11 Plan, you can remove pounds and inches from thighs, neck, legs, waist -- all OVER -- without ever going hungry -- and stabilize reduced weight at a level you've always dreamed of holding as you follow the Plan. While you eat satisfying meals, no longer will you be the prisoner of the overeating habit, because with the X-11 Plan, *you eat less and want less. So you lose weight . . . while you eat well.*

NO EASIER REDUCING METHOD EVER DEVELOPED

1. COUNTERACTS HUNGER
Take one of these tablets a half-hour or so before your regular meals. It combines a pure vegetable extract that has no calories, and quickly starts acting to provide the feeling of a fuller, satisfied, contented stomach. You eat 3 satisfying balanced meals—*eat what you want, but eat less.*

2. ACTS AS APPETITE APPEASER
Part of the secret of this method is a unique ingredient that acts as a beneficial appetite appeaser, *which puts a "brake" on your cravings for sweets,* candy, pastries, rich gravies, High-Fat/High-Calorie foods—everything. It helps you conduct a kind of psychological warfare with yourself as you break some bad old eating habits you probably thought you were stuck with forever.

3. FORTIFIED WITH VITAMINS, MINERALS
Important to those who feel it their lot to feel jumpy, jittery, or fagged out when dieting. Your daily supply now combines a whole spectrum of vitamins and minerals, including: *Vitamin A, Vitamin B1, Vitamin B2, Vitamin B6, Vitamin C, Niacinamide, Vitamin E, Vitamin B12* -- all so important to helping prevent these nutritional deficiencies.

X-11

42 TABLETS **2.98**

105 TABLETS **4.98**

SATISFACTION GUARANTEED OR MONEY BACK

Grand Central
FAMILY SAVINGS STORE

OBTAINED BY Dean Fremin ATTORNEY

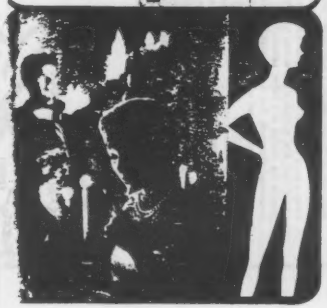
FILE NO. 7-CR-3187

Advertising Supplement to Chicago Tribune THE WORLD'S GREATEST NEWSPAPER Sunday, February 11, 1973 Section 9-A

EAT WELL...and Get Rid of 5, 10, 25 or More Pounds!

lose ugly fat

with This Amazingly Easy Reducing Plan!



Eat 3 Sensible Meals a Day —and SLIM DOWN!

■ Today, thousands of women throughout America are discovering an extraordinary simple Plan that helps get rid of 5, 10, 25 or even more pounds and stabilize achieved weight at a level they've "dreamed of" holding as you follow this simple Plan.

■ Not by suffering thru starvation dieting hunger . . . not by sticking to boring reducing diets . . . not by strenuous exercising . . . not by any of the humdrum methods so many women have tried, and given up in despair.

Now you can EAT and LOSE WEIGHT! You can satisfy your appetite and remove pounds and inches . . . at thighs, neck, legs, waistline . . . all over!

■ So, why carry around needless, excess weight — when it's so simple to follow the X-11 Reducing Plan to lose ugly fat.

■ Just take one of these specialized tablets 1 hour before your regular meals. Its unusual combination of ingredients helps give you the feeling of a fuller, contented stomach; appeases cravings for 'tween-meal snacks; and provides a range of vitamins and minerals to help prevent these nutritional deficiencies.

MONEY BACK GUARANTEE

Enjoy eating the foods you choose while you lose unsightly, superfluous fat. Get on the X-11 Plan now. Available at your favorite drug or department store on guarantee of satisfaction — or your money back.

GUARANTEED or MONEY BACK

Don't miss out! Take advantage of this generous offer that you must be completely satisfied after taking your first 14-day trial of the X-11 Reducing Plan — or money refunded without questions asked.

42 TABLETS . . . $3.00
105 TABLETS . . . $5.00

If Your Drug or Department Store has run out of stock

FOR QUICK ACTION USE THIS COUPON TO ORDER BY MAIL

Fill out coupon below — place in envelope MAIL TODAY!

If your store is out of stock — fill out and mail this coupon for your

QUICK-E[illegible]-MAIL-SUPPLY

Just place this coupon in an envelope and enclose your [illegible] in guarantee of satisfaction — [illegible] money back. Your order will be shipped same [illegible] it is received.

GUARANTEE
You must be 100% delighted with results of your first package or your money will be refunded, no questions asked.

PLEASE PRINT YOUR NAME AND ADDRESS BELOW
Mail to: WALGREENS
Box 695
Berkeley, Ill 60163
My store is out of stock
Please rush supply checked below
☐ 42 tablets @ $3.00 ☐ 105 tablets @ $5.00

Name . . . . . .
Address . . . . . .
City . . . . . State . . . . . Zip . . . . . .
☐ Cash enclosed ☐ Money Order ☐ Check enclosed

Illinois residents please add 5% sales tax.

T-23

X-11 IS HERE!

an effective Plan to Lose Ugly Fat - without ever missing a meal!

Now you can satisfy your appetite and peel off that excessive weight

I Lost 80lbs.!

"It's good to know there is a way to lose ugly fat and keep from going at it a level I dreamed of holding," says Mrs. Ken Stoddard, Norfolk, Neb. "When I started on the X-11 Reducing Plan, I was 205 pounds. Now my weight is down to 125 pounds."

Watch Ugly Fat Disappear

Remove pounds and inches at thighs, neck, hips, waistline — ALL OVER!

Here is that unique new figure slimming plan, called the X-11 Reducing Plan, that Mrs. Stoddard used to get rid of 5, 10, 25 or even more pounds of unsightly superfat. Now, in the privacy of your own home, three appealing, sensible meals a day after day. ■ Just one of these delicious meals is enough to satisfy your appetite for unknown ill results between meals. ■ You'll delight in the wide spectrum of vitamins and minerals to help provide all these nutritional deficiencies. ■ Because your taken-down intake helps reduce your weight. ■ So, if you're trying to lose weight, and it's difficult, you'll be happy to find out how this diet breaks you free from hunger. For the X-11 Reducing Plan can help you to be slimmer than you ever dreamed possible.

Enjoy eating 3 sensible meals a day... while you take off unsightly fat.

■ The new X-11 Reducing Plan helps you control your appetite in spite of yourself. You eat less — but you're satisfied. You actually train yourself again, step by step to normal and sane habits — and your appetite and will power to control natural cravings for between meal snacks is restored.

Mail This Coupon Today for Your Supply of X-11 Tablets if your store has run out of stock

The X-11 Reducing Plan has been made available at all Walgreens and other fine drug stores. If, because of the demand, your store has run out of the supply of X-11 tablets, just tear off this card, fill in other side and mail today.

Mail this card with your remittance to: WALGREENS Box 695 Berkley, Ill. 60163

Please Print Your Name and Address On Other Side

GUARANTEE

You must be 100% delighted with results of your first package or your money will be refunded — no questions asked.

IF YOUR STORE HAS RUN OUT OF X-11 TABLETS HURRY!!!

Fill out and mail this coupon for your supply

Lose Ugly Fat – or Your Money Back

Just fill out coupon below Place in envelope MAIL TODAY!

■ The new X-11 Reducing Plan, Laboratory Science has perfected a Tiny Tablet for EASY REDUCING

SATISFIES APPETITE
APPEASES TASTE-SENSE
SUPPLEMENTS VITAMINS

Recently, laboratory science has perfected a tiny tablet that provides clinic-tested ingredients to satisfy appetite, appease taste and supplement vitamins. These ingredients, plus others, care... are blended and measured into the X-11 Tablets.

NOW AT **Walgreens** AND OTHER FINE DRUG STORES

Don't Delay!

IF YOUR STORE HAS RUN OUT OF STOCK, MAIL ATTACHED COUPON FOR QUICK ACTION.

c x 45

[15] 2. ACTS AS AN APPETITE APPEASER

Part of the secret of this method is a unique ingredient that acts as a beneficial appetite appeaser, which puts a "brake" on your cravings for sweets, candy, pastries, rich gravies. High-Fat/High-Calorie foods - everything. It helps you conduct a kind of psychological warfare with yourself as you break some bad old eating habits you probably thought you were stuck with forever. Thus, your appetite is appeased while you take off fat.

13. The advertisement appearing in the *Seattle Times,* July 8, 1973, also reprinted, emphasizes testimonials of ladies reporting very substantial weight losses (CX 19). It also contains a picture of two fingers holding the X-11 tablet, and advises the reader that if not 100 percent delighted, the "first package" of either 42 tablets or 105 tablets may be returned for an immediate refund.

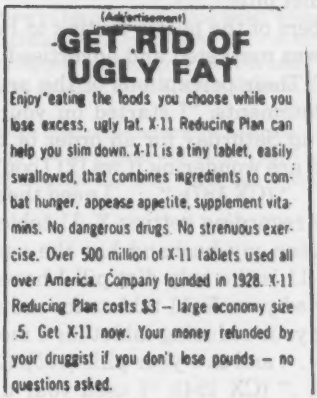
14. The advertisement in *The Idaho Statesman,* September 9, 1973, likewise reprinted, contains two pictures of the X-11 tablet (CX 48). The first features the picture of a young lady holding up an X-11 tablet and states:

> NOW. . . LABORATORY SCIENCE HAS PERFECTED A TINY PRE-MEAL TABLET WITH A PLAN THAT LETS YOU ENJOY FOODS YOU CHOOSE

The bottom half of this advertisement emphasizes the X-11 tablet by a much larger picture of two fingers holding the tablet with adjacent paragraphs entitled "COUNTERACTS HUNGER," "ACTS AS APPETITE APPEASER," containing the same text referred to in Finding 12, and "FORTIFIED WITH VITAMINS, MINERALS." The advertisement concludes by announcing "42 Tablets 2.98," "105 Tablets 4.98." [19]

15. The elaborate advertising supplement distributed in the *Chicago-Tribune,* February 11, 1973, although varying in language, is similar in its message and representations to the foregoing advertisements (CX 49). A post card for mailing to the Walgreen drug chain is printed within the advertisement with the admonition to prospective purchasers: "IF YOUR STORE HAS RUN OUT OF X-11 TABLETS HURRY!!!" "FILL OUT AND MAIL THIS COUPON FOR YOUR SUPPLY." This advertisement is headlined "X-11 IS HERE" and gives prominence to the picture of a tablet being held between two fingers, telling Chicago-area readers that ". . . Laboratory Science has perfected a Tiny Tablet for EASY REDUCING."

16. Some of respondents' smaller advertisements designed for insertion in newspaper columns, or in fractions of pages in periodicals, condense the representations contained in the larger advertisements and refer to X-11 simply as a "tiny tablet." The following is an example (CX 42):


(Advertisement)

GET RID OF UGLY FAT

Enjoy eating the foods you choose while you lose excess, ugly fat. X-11 Reducing Plan can help you slim down. X-11 is a tiny tablet, easily swallowed, that combines ingredients to combat hunger, appease appetite, supplement vitamins. No dangerous drugs. No strenuous exercise. Over 500 million of X-11 tablets used all over America. Company founded in 1928. X-11 Reducing Plan costs $3 – large economy size .5. Get X-11 now. Your money refunded by your druggist if you don't lose pounds – no questions asked.

(See also CX 5–7 and 77.)

[20] 17. Other advertisements told members of the public that they could "LOSE THAT FAT" but "EAT SUFFICIENTLY" by taking "a pre-meal X–11 Tablet before meals" (CX 51) and that "today" there is "an amazing new reducing plan with X–11 Tablets" (CX 52, 61 and 84). Still other advertisements were again specific in telling the public "WHAT EACH TABLET CONTAINS" (CX 13, 69–73, 90 and 91). Occasional advertisements stated "NO PRESCRIPTION NEEDED" (CX 12, 57 and 65), and some told the public to "[A]sk the pharmacist for a 42 tablet pack of X–11 Reducing Aid" (CX 53 and 66).

18. With few exceptions, respondents' advertisements concluded with a coupon or statement offering *tablets* to the public, usually 42 for $3.00 and 105 for $5.00 (see *e.g.*, CX 18–19 and 49 reprinted in this decision).

19. The ladies whose testimonials are prominently displayed in the *Seattle Times* advertisement (CX 19), and published in other newspapers (CX 1, 16, and 76), perceived the advertisements as promoting pills or tablets. Mrs. George Stowe in her initial letter to Porter & Dietsch refers to taking "X–11 tablets" (CX 149). Mrs. Beverly Tellier begins by stating "I am a user of your X–11 diet pills" (CX 148; see also CX 184(2)), and Mrs. Ken Schmidt states to Porter & Dietsch that "I talked with you from Walgreen Drug here in Norfolk, Nebraska, last week, about your X–11 diet pills" (CX 147). In publishing these testimonials respondents changed all such product

references to read "X-11 Plan" or "X-11 Reducing Plan," rather than "tablets" or "diet pills."

20. Other members of the public writing to Porter & Dietsch also looked upon what was marketed and advertised as "tablets," "pills" or "reducing pills." Their perceptions of the product are evidenced by the following statements: "I started on your X-11 Tablets. . ." (CX 185); "I called up Saturday for an order of 2 boxes of diet X-11 pills" (CX 186); "We are wondering if we [21] couldn't buy these pills directly from you . . ." (CX 187); ". . . I need these pills" (CX 188); "I received your letter regarding getting X-11 tablets in Sutter Creek" (CX 189); "On occasion my husband has the use of your X-11 diet pills" (CX 190); "X-11 is the only diet pill I have found that works" (CX 191); "I have tried your X-11 tablets for reducing. . ." (CX 192); "I have been taking your reducing tablet for 4 months. . ." (CX 193); "I was on vacation . . . and saw your pills (105)/(X-11) reducing pills so I bought a box. . ." (CX 194); "I used your diet pills about four years ago. . .", "P.S. The name of the diet pills are X-11 reducing plan" (CX 195); "Please send me another box of 42 X-11 Reducing pills. . ." (CX 196); "X-11 is the best reducing tablet sold" (CX 199); "Will you please let me know if there is a place . . . where I can purchase the X-11 reducing Plan pills" (CX 201); "So I tried X-11 and got down to 130 pounds on the first box of pills" (CX 202); ". . .send me some X-11 Reducing Plan Tablets. . .I try some of the other kind of Tablets, but I got sick from them . . ." (CX 203); "In past years I have taken several kinds of reducing pills (from Doctors). All they did was make me nervous . . . But on X-11 there is no after effects" (CX 204); ". . .[i] ordered $5.00 worth of diet pills from you . . ." (CX 206); and, "I would like for you to send me X-11 reducing tablets" (CX 207).

21. The purpose behind the repeated use of the word "plan" in the advertising copy for X-11 tablets, and the use of "X-11 Reducing Plan" as Porter & Dietsch's designation for its product is evident in the letter dated September 13, 1973, to Mr. Fraser, Porter & Dietsch's president, from Mr. Furth, vice-president of respondent Kelly Ketting Furth and the account executive for X-11 tablet advertising (CX 164): [22]

Dear Bill:

* * * * * * *

Appedrine is flirting with danger. It is the same kind of danger that hit us in the head in the insurance business.

Appedrine and Hungrex (even Odrinex) put emphasis on the tablets. That's murder, because the pills will not reduce weight an iota.

It is the "Plan" that will keep us out of hot water.

I've said it before. If you want me to put the same kind of "punch" into the advertising, so be it. But we've been getting along swell, without it.

Let them make their claims, we'll make ours. But I'm afraid we're all going to get into hot water because of Appedrine, Hungrex and Odrinex.

Because Hungrex won its case at one time, doesn't mean the sore cannot be reopened.

I've seen it happen in the mail order insurance business.

[23] I don't know if the new 42 line ad will work. That's what tests are for. Ads like Appedrine (from a copy standpoint) may work, but it may put us out of business faster.

* * * * * * *

Cordially,

Joseph Furth
Vice President

22. Labeling the box of tablets the "X–11 Reducing Plan" and including within the tablet box a leaflet (CX 37 and 40) containing a low-calorie diet, a calorie value chart, a table of desirable weights and advice, *inter alia,* that in most cases "obesity is caused strictly by overeating and indiscretions of diet," that "weight loss is only accomplished when a minimum of calories are consumed," that the purchaser must not "expect a miracle overnight" but "must practice a little 'self-denial' — plus, a will power to get thin," and that if the X–11 tablets are taken one-half hour before each meal *and* the "Plan, or any other low-calorie diet" is followed, he or she "should lose weight," does not transform the advertising of "diet pills" into the promotion of a reducing "Plan" so as to mean that no representations were made to the public about X–11 tablets.

23. Respondents were engaged in the advertising, marketing and sale of X–11 tablets. The representations to the public in respondents' advertisements were about X–11 tablets and their efficacy in facilitating weight loss.[5] Such representations were made for the sole purpose of promoting and inducing the sale of X–11 tablets. [24]

ADVERTISING OF X-11 TABLETS

24. Although the pictures, language and format varied, essentially similar statements and themes pervaded respondents' advertisements of X-11 tablets. Respondents agree that "from 1969 to date, the advertising of the 'X-11 Reducing Plan' had remained substantially unchanged" (*see* Memorandum In Support of Motion to

[5] All advertising slicks or mats in the record (CX 50 through 91) were published by respondents in some media (Fraser, Tr. 804 and 883).

Dismiss, etc., filed October 30, 1975, p. 11; *see also* Furth, Tr. 952, 968–69 and 978–80).

25. Porter & Dietsch's advertising expenditures for X-11 tablets were as follows (CX 179):

Year (Ending April 30)	*Dollars*
1975	$882,570
1974	1,082,396
1973	862,986
1972	781,566
1971	593,723
1970	460,902

26. The record contains a large number of advertisements published in various media, predominately newspapers, promoting the X-11 tablets. As noted earlier, five examples have been reprinted in this decision, four large ads and a small one (CX 18–19, 42, 48 and 49), and have already been discussed to some degree. Major metropolitan dailies such as the *Seattle Post-Intelligencer* (CX 1–4), the *Seattle Times* (CX 19), the *Washington Post* (CX 47), the *Baltimore Sun* (CX 46), the *Chicago Tribune* (CX 49) were utilized, as well as smaller circulation newspapers such as the *Anchorage Daily Times* (CX 33), the *Longview Daily News* (CX 21), the *Greensboro Daily News* (CX 74), and the *Peoria Journal-Star* (CX 83). Specialized publications such as *TV Guide* (CX 10–13) were also employed in the dissemination of X-11 advertisements.

27. Ads occupying a small portion of a newspaper or periodical page (CX 5–7, 9, 17, 20–34, 42–43, 51, 54, 64, 77, and 89), as well as very large and prominent advertisements, were published (CX 1–4, 8, 10, 13–16, 18, 35, 44–48, [25] 50, 52–53, 66–76, 78–88, 90–91). Some of the large advertisements were elaborate color inserts known as "free standing stuffers" in the advertising trade (Furth, Tr. 930–33). These were placed in the Sunday editions of the nation's leading newspapers. CX 46 was inserted in the *Baltimore Sun* for Sunday, April 20, 1969, CX 47 in the *Washington Post* on the same date, and CX 49 in the *Chicago Tribune* on February 11, 1973.

REPRESENTATIONS CONVEYED TO THE PUBLIC BY RESPONDENTS' ADVERTISEMENTS FOR X-11 TABLETS

1. *Representation that users of X-11 tablets can lose weight without restricting their accustomed caloric intake and while they continue to eat the foods of their choice*

28. The advertisement published in the *Seattle Times*, September

10, 1972 (CX 18), as indicated, told prospective users that "X-11 is here" and they could "EAT WELL . . . AND LOSE THAT FAT—without ever missing a meal," that they could "satisfy [their] appetite" while taking off "pounds," that they could lose "5, 10, 25 or more pounds" without denying themselves, without dieting hunger, that they would "eat what [they] want," but would eat less because they would not "be the prisoner of the overeating habit."

29. The advertisement published in the *Seattle Times,* July 8, 1973 (CX 19), also told prospective users of the X-11 tablets that they could "EAT WELL . . . AND LOSE THAT FAT." The ad advised that "NO STARVATION DIETING" was required, that unsightly fat could be lost without "suffering through starvation dieting hunger" or following "boring reducing diets," or any of the "humdrum methods you have known and given up." The advertisement told prospective purchasers of X-11 tablets that they could eat "satisfying meals and snacks," that they would not "go to bed hungry," that the "X-11 Plan" was "not a crash or starvation diet" but a "proved and sound method" "to curb the appetite and still eat 3 satisfying, sensible meals [26] a day," and that laboratory science had perfected a "tiny pre-meal tablet" which "lets you eat three sensible meals a day plus 'tween meal snacks."

30. The advertisement published June 24, 1973, in the *Seattle Post-Intelligencer* TV Section (CX 2) likewise featured in black, prominent type "Eat Well . . . Lose That Fat!" The advertisement referred to the "X-11 Plan" as "an extraordinary easy figure-slimming Plan" that offered a way to "get rid of unsightly, superfluous fat" without "missing a meal," and told the prospective X-11 tablet user that she or he could "Satisfy your appetite and peel off those excess, extra pounds, too."

31. The advertisement in the same newspaper on June 25, 1974 (CX 3), was again headed in boldtype "Eat Well . . . And Lose Ugly Fat." This advertisement continued the theme of the earlier ads that X-11 tablet users could "EAT AND LOSE THAT EXCESSIVE WEIGHT," could "satisfy" their appetites and yet "peel off extra pounds" and could remove excessive weight "without ever going hungry." An identical ad was published in the *Seattle Post-Intelligencer* TV Section January 1, 1975 (CX 4).

32. The advertisement in the *Anchorage Daily Times* of March 29, 1974 (CX 8) repeated the statements "Eat Well . . . and Lose That Fat!", that laboratory science had "PERFECTED A TINY PRE-MEAL TABLET WITH A PLAN THAT LETS YOU ENJOY FOODS YOU CHOOSE," that X-11 users could "EAT AND LOSE THAT EXCESSIVE WEIGHT," and could "satisfy" their appetites and "peel off those extra pounds" "without

ever going hungry." Users were promised "you will lose weight . . . while you eat well."

33. The full page advertisement in the *Spokane Spokesman-Review* Sunday Magazine, October 22, 1972 (CX 15), similarly announced "EAT WELL . . . AND LOSE THAT FAT!" "WITHOUT EVER MISSING A MEAL," and "You do not deny yourself." [27]

34. A large advertisement in the *Seattle Times,* February 3, 1974 (CX 45), was headlined "NOW EAT WELL" and "LOSE UGLY FAT!" The text continued this theme with the statement "So enjoy eating that satisfies your appetite as you peel off those extra pounds. You lose weight . . . while you eat well."

35. The elaborate "free standing stuffer" in the Sunday *Baltimore Sun* on April 20, 1969 (CX 46) featured banner headlines which read "Lose Ugly Fat" with an "Amazingly Easy Reducing Plan." The text promised that fat would be lost without "starvation dieting hunger," "boring reducing diets" or "humdrum methods so many women have tried, and given up in despair." Readers were assured that users of X-11 tablets could "now" "EAT AND LOSE WEIGHT," could "satisfy" their appetites yet "remove pounds and inches," could "peel off that excessive weight," and could "Enjoy eating the foods" they chose while they lost "unsightly, superfluous fat." Readers were told in heavy letter type "X-11 IS HERE," and that they could "LOSE UGLY FAT . . . without ever missing a meal!" An identical "free standing stuffer" was inserted in the *Washington Post* on the same Sunday (CX 47).

36. Another advertisement disseminated by respondents announced "Are you on a diet? Or planning to go on one? WHY STARVE YOURSELF WHILE YOU REDUCE? EAT . . . AND LOSE THAT FAT!" (CX 57) Other advertisements told the public "TAKE OFF UGLY FAT WITH AN 'EAT WELL' EATING PLAN" (CX 64). Still others stated "Enjoy eating the foods you choose while you lose excess, ugly fat" (CX 77).

37. The "free standing stuffer" inserted in *The Greensboro Record,* January 26, 1969 (CX 74), featured "EAT WHAT YOU WANT – AND SLIM DOWN," as did the large insert of January 12, 1969, in the *Wisconsin State Journal* (CX 75), and the insert of July 28, 1968, in the *Peoria Journal Star* (CX 83). Other advertisements communicated similar representations, with occasional minor changes in emphasis. See CX 5-7, 9-35, 42-45, and 47-91. [28]

38. Respondents' advertising told the public that with the X-11 tablets people could "EAT WELL AND LOSE THAT UGLY FAT" (CX 2), that X-11 tablets put "enjoyment into eating" while "unsightly, superfluous fat" was lost (CX 52), that overweight persons could take off ugly fat with an "EAT WELL" eating plan (CX 50), and that people

who wanted to lose weight could "eat" and lose "pounds" without dieting hunger, or giving up meals, or by any of the "torturous 500/1000 calorie diets so many women try, and give up in despair" (CX 72).

39. Incorporation deep in the advertising copy of occasional phrases such as users will no longer be the prisoner of the "overeating habit" or that users will "want less" and therefore "eat less" does not change the overall message conveyed to the public. The overall effect of respondents' advertisements was to convey the net impression to the public that users of X-11 tablets could lose body weight without dieting or consciously or materially changing their eating habits, in the language of the complaint, "without restricting their accustomed caloric intake and while they continue to eat the foods of their choice."

2. *Representation that substantially all users of X-11 tablets would lose a significant amount of weight and that Respondents had a reasonable basis from which to conclude this*

40. Although the advertisements for X-11 varied in their format and wording, as stated, the themes remained relatively constant. Purchasers were assured they would realize significant weight losses through use of the X-11 tablets. Respondents' advertisements were of a nature to attract the attention of the seriously overweight, especially women, and to induce them to purchase X-11 tablets in the hope of losing large amounts of excess fat.

41. Representations of significant, indeed, very large, weight losses achievable through the X-11 tablets are prominent in the advertisements respondents disseminated to the public. The impact of these representations is evident by statements recurring throughout the X-11 advertisements, as follows: [29] "I Used to Weigh 160 lbs. Now I'm Down to 105," i.e., 55 pounds lost, (CX 1, 16, 19, and 76); "I lost over 40 lbs.," "And I lost over 40 lbs. too" (CX 1, 16, 19, and 76); "I Lost 80 lbs" (CX 2, 9, 18, 20, 22-24, 30-31, 33-35, 44, and 81); "Lose Ugly Fat" (CX 3, 4, 10, 14, 25-29, 32, 45, 53-56, 60-61, 63-64, 66-67, 74-75, 78-80, 82-84, and 88); "Lose That Fat" (CX 8, 11, 48, 50-51, 57-59, 69-73, 79, 87, and 90-91); "So You Want To Lose 5, 10, 25 Or More Pounds" (CX 1, 14, 48, 58-59, 63, 78-80, 82, and 87); "Get Rid of 5, 10, 25 Or More Pounds" (CX 13, 15, 18, 46-47, 49, 50, 52, 57, 65, 70-75, 83, 86, and 90-91); "Get Rid of Ugly Fat" (CX 42, 77); "Lose 5, 10, 25 Or More Pounds Of Fat" (CX 67, 88); "College Student Lost 83 lbs Of Ugly Fat" (CX 68); "Now. . .Remove Pounds And Inches From

Thighs, Neck, Legs, Waist" (CX 84–85); "I enjoy wearing dresses sizes 11–12's rather than 20 1/2" (CX 44).

42. The X–11 advertisements also conveyed the impression of slimness, and significant weight losses to be achieved through use of X–11 tablets, by pictures of trim-looking women, and silhouettes of slim female figures (CX 1–4, 8–11, 13, 29–31, 33–35, 44–49, 51–56, 58–61, 63, 66–67, 69–76, 78–83, 85, 87–88 and 90–91).

43. Testimonials reporting very large weight losses and implying that new users of X–11 tablets could anticipate like results appeared frequently and were highlighted in respondents' advertisements. These testimonials reported weight losses, as just quoted, of 55 lbs., over 40 lbs., and 83 lbs. (CX 1–2, 9, 16, 18–20, 22–24, 33–35, 44, 68, 76, and 81).

44. Respondents' advertising portrayed the X–11 tablets as a new, simple, easy, amazing, extraordinary way to lose many pounds of fat. The achievement of such weight losses was, in fact, depicted as a virtual certainty. Continual references in respondents' advertisements to "Laboratory Science" having developed a "Tiny Tablet" coupled with the words "NOW," "TODAY," or [30] "RECENTLY" conveyed the impression that the X–11 tablets were the culmination of scientific research, and reinforced the representation that substantially all users could and would lose any amount of pounds desired, up to 80 and 83 lbs. (CX 8, 14, 46–47, 52, 56, 59, 61, 74–75, 79, 83–84, and 87).

45. Significant, large weight losses, in fact, were represented, as "automatic" (CX 74–75):

> So why carry around needless, excess weight — when it's so easy to lose ugly fat *automatically* with the new X–11 Reducing Plan" (Emphasis in original).

The overweight were assured that "thousands of women throughout America are discovering an extraordinary new plan that *automatically* helps get rid of 5, 10, 25 or even more pounds. . ." (CX 74, 75). The public was promised that the X–11 plan "*automatically* keeps working at home, at work, at play — 24 hours a day." (See also CX 46, 47 and 49 which contain similar language.)

46. Significant, large weight losses were guaranteed: "RESULTS ARE GUARANTEED — OR MONEY BACK" (CX 1, 16–17, 19); "[I]f flabby fat doesn't disappear, just return the empty package for an immediate refund" (CX 2 and 81; see also 57–58, and 65–66), and "If flabby fat does not vanish 'like magic' when you follow the X–11 Reducing Plan, just return the empty package for an immediate refund" (CX 15). This theme was constantly repeated in varying language: "LOSE WEIGHT OR YOUR MONEY BACK" (CX 60); "LOSE FAT OR

MONEY BACK" (CX 43 and 77);-and "TAKE WEIGHT OFF WITH VERY FIRST BOX OR MONEY BACK" (CX 90). The advertisements repeatedly assured members of the public that "You have nothing to lose but pounds and inches," and that large weight losses would be achieved (CX 24, 50, and 79). [31]

47. Respondents' advertisements for X-11 tablets represented to the public that substantially all users of X-11 tablets would lose a significant, in fact, as large an amount of weight as they desired, and that respondents had a reasonable basis from which to conclude this.

3. *Representation that the X-11 tablets contained a "unique" ingredient*

48. An examination of respondents' X-11 advertising reveals that, through the use of explicit words and phrases, these advertisements conveyed to the public the representation that X-11 tablets contained something new, different and unusual—a "unique ingredient" (CX 3-4, 10, 14-15, 18, 48, 50, 63, 68, 70-80, 82, and 87). Respondents Porter & Dietsch, William H. Fraser, Kelly Ketting Furth and Joseph Furth admitted in their answer that their advertisements represented directly or by implication that the X-11 tablet contained a "unique" ingredient (Ans. P&D, ¶9), and subsequently identified this "unique" ingredient as phenylpropanolamine (Supp. Adm. P&D, No. 41).

49. In addition to specific reference to a "unique" ingredient, many advertisements described the X-11 tablet as: "a unique formula" (CX 8, 10, 14, 48, 59, 67, 78-80, 82, and 87-88); a "unique preparation" (CX 52, 56, 61 and 84-85); a "special formula" (CX 54); a "specialized, laboratory-approved tablet" (CX 74-75); an "unusual combination of ingredients" (CX 49, 52, 56, 61, 74, and 83-85); a combination of "clinic-tested ingredients" (CX 46-47, 49, 74-75, and 83), and "one of the STRONGEST DIET AIDS available without a prescription" (CX 3-4, 10-11, 58, 63, 68, 78, 80, 82 and 88). These phrases were copiously utilized in respondents' advertisements to reinforce the claimed "uniqueness" of X-11 tablets to the purchasing public. [32]

DECEPTIONS IN THE ADVERTISING OF X-11 TABLETS

1. *Users of X-11 tablets cannot lose weight without restricting their accustomed caloric intake nor while continuing to eat the foods of their choice*

50. Excess body weight results from ingestion of more food than the body uses (Dr. Drenick, Tr. 345). A reduction in calories taken in

by the body or an increase in calories used by the body must occur for a person to lose any weight, and the weight lost is directly related to the reduction in calories consumed and/or calories utilized (Dr. Drenick, Tr. 350). However, in programs for the overweight or obese, reduction in caloric intake is emphasized. Dr. Thaddeus E. Prout, an expert in endocrinology and metabolism from Johns Hopkins University Medical School, testified (Tr. 706):

> In general, one does not attack obesity on the outgoing side for the most part, since it is not profitable to try to run off pounds, in the usual sense of the word, without caloric reduction.

For a person to lose a pound of excess fat, a calorie deficit of about 3500 must be incurred (Dr. Margen, Tr. 264).

51. The X-11 tablets do not, and cannot, in and of themselves, remove weight, fat or excess poundage from the human body (CX 164; Dr. Drenick, Tr. 411; Dr. Margen, Tr. 162; Dr. Fineberg, Tr. 1380–82, and 1392–93).

52. As set forth in prior findings, respondents' advertisements represented that X-11 tablet users could "Eat Well" and lose weight, and conveyed the net [33] impression to prospective purchasers that ingestion of X-11 tablets would result in a loss of weight without restriction of accustomed caloric intake and while they continued to eat the foods of their choice. Although this representation was made repeatedly in X-11 advertisements, respondents acknowledged in the package insert that "weight loss is only accomplished when a minimum of calories are consumed" (CX 37, 40, and 133). The leaflet admonished X-11 tablet users not to eat between meals and to follow the diet enclosed with the X-11 tablets "or any other low calorie diet." The diet enclosed with the X-11 tablets provided for a drastically restricted caloric intake. Estimates of the caloric intake permitted under this diet ranged from 650 to 1,000 calories (Dr. Margen, Tr. 169; Dr. Drenick, Tr. 404; Furth, Tr. 986 and 990), and expert witnesses characterized it as a starvation or semi-starvation diet (Dr. Margen, Tr. 169; Dr. Drenick, Tr. 406; Dr. Fineberg, Tr. 1330). Respondents' diet was also described as "ketogenic" and "unphysiologic." Such a diet causes the person following it to experience a feeling of illness and general weakness, and has other undesirable physical effects (Dr. Margen, Tr. 169–72; Dr. Drenick 415–16).

53. Counsel for respondents Porter & Dietsch, William H. Fraser, Kelly Ketting Furth and Joseph Furth admit that users of X-11 tablets "cannot lose weight without restricting their accustomed caloric intake" (Tr. 661).

54. Respondents' advertisements also represented, as described, that users of X-11 tablets could lose weight while continuing to eat the foods of their choice. Porter & Dietsch admit that in order to lose weight users of X-11 tablets must diet and not consume high-calorie foods such as gravies, nuts, candy, mayonnaise, pastries, whole milk, fried foods, rich dressings and rich desserts, and must reduce or minimize their intake of salt, butter and high-calorie foods generally (Adm. P&D, No. 28). The insert in the package of X-11 tablets admonishes X-11 users to take coffee or tea without sugar or cream, to eat no gravy, to trim the [34] fat off all meat, to cut down on cream, butter and other high-calorie foods, and to avoid all fried foods, nuts, candy and rich dressings (CX 37, 40 and 133). This extensive enumeration of dietary restrictions makes it clear that users of X-11 tablets cannot continue to eat the foods of their choice. They must restrict the foods and quantities they consume to those permitted under the X-11 diet or other low-calorie diets. The representations of respondents in their advertisements that users of X-11 tablets could lose weight without restricting their accustomed caloric intake, and while continuing to eat foods of their choice, were false, misleading and deceptive.

2. Respondents had no reasonable basis when they introduced their X-11 tablets and now have no reasonable basis from which to conclude that substantially all users of X-11 tablets would lose a significant amount of weight

55. As stated earlier, the X-11 tablets contain some vitamins, caffeine, methylcellulose and phenylpropanolamine. Users were to take one (1) tablet a half-hour before each meal, and then to follow the menu enclosed in the box of X-11 tablets "or any other low-calorie diet." According to respondents' advertising the X-11 tablets "counteracted hunger," "curbed," "appeased," or "depressed" the appetite, put a "brake" on cravings for high-calorie foods—"everything," and enabled users to adhere to the drastically low-calorie intake provided. The alleged appetite "depressant," "appeaser," "brake" or "diet aid" in the X-11 tablet is phenylpropanolamine, and the alleged hunger "counteracter" is methylcellulose, a vegetable extract. Respondents' advertisements represented that, because of the presence of phenylpropanolamine and methylcellulose in X-11 tablets, all users would achieve significant weight losses of virtually any amount desired. [35]

A. Respondents had conducted no tests, and were in possession of no reports, tests or studies providing a reasonable basis from which to conclude that substantially all users of X-11 tablets would lose a significant amount of weight

56. Individual respondent William H. Fraser, president of corporate respondent Porter & Dietsch, admitted that he had nothing to support the claims made in advertisements for the X-11 tablets. He testified (Tr. 822):

Q. Mr. Fraser, at the time you received that letter and in 1974 what tests or studies or reports of studies or reports of tests or other evidence of effectiveness of the X-11 product did you have in your possession?

A. I did not have any.

Q. Mr. Fraser, at the time the complaint in this matter issued in August 1975, what tests or studies or reports of tests or other evidence of effectiveness did you have in your possession?

A. I had none.

57. In 1969 and 1970 the FDA sent one of its investigators to Porter & Dietsch as a result of the advertising claims which were being published "around the country" (Tr. 904-07). The FDA investigator asked Mr. Fraser for any "information or reports on the efficacy of the product which would indicate that it [36] was effective for the claims that were being made for it" (Tr. 909-10). Mr. Fraser's response was that he had none (Tr. 910).

58. The moving force behind the formation of Porter & Dietsch, and the initiation and marketing of the X-11 tablets, was Frank Gettleman, a Chicago attorney, now deceased. In 1967 he contacted Mr. Fraser, who had just suffered a business reverse, telling him that he had something that Mr. Fraser could make a "comeback" at. At a subsequent meeting in Chicago, Mr. Gettleman told Mr. Fraser about "this diet plan," the X-11 tablets (Tr. 823-24).

59. Mr. Fraser testified that he placed complete reliance upon Mr. Gettleman for having support and authority for the advertising representations made for X-11 tablets. Mr. Fraser testified (Tr. 877):

When Mr. Gettleman sent an ad to me he marked it okay. I did not cross a T nor dot an I. He was the king. He was the man that knew the obesity field. He knew the law. He knew the regulations and I relied entirely on him.

60. Mr. Gettleman had no information, research reports, studies or competent test evidence, which provided a reasonable basis for the representations of weight loss contained in respondents' X-11

advertising. Individual respondent Joseph Furth, who handled the advertising of the X-11 tablets, testified that in 1968, when his firm, Kelly Ketting Furth, took over the X-11 account, Mr. Gettleman showed him two documents (Tr. 1001 and 1006), the 1967 Certification of Record by then Hearing Examiner Poindexter in *Alleghany Pharmacal Corp., et al.,* Dkt. 7176, 75 F.T.C. 990, and the Court of Appeals decision in [37] *Carlay Co.* v. *Federal Trade Commission,* 153 F.2d 493 (7th Cir. 1946). In 1972 when the Commission's staff contacted respondent Pay'n Save Corporation in this matter requesting substantiation of the representations in the X-11 advertisements, the Commission's letter of inquiry (CX 112) was sent by Pay'n Save to Porter & Dietsch for reply, inasmuch as "Pay'n Save had conducted no scientific studies of X-11" (Affidavit of Calvin Hendricks, Executive Vice-President of Pay'n Save Corporation, attached to Motion to Dismiss Complaint Before Trial Or, In the Alternative, For Summary Decision dated November 28, 1975, p. 3). Mr. Gettleman answered this inquiry on behalf of Porter & Dietsch and Pay'n Save, and forwarded to the Commission, as substantiation for the X-11 advertising, copies of the *Alleghany* certification, *supra,* and the *Carlay* decision, *supra* (CX 122-26).

61. In his letter Mr. Gettleman discussed the evidence introduced in the *Alleghany* proceeding, contending that it supported the claims made in respondents' advertising. A thorough reading of the *Alleghany* certification discloses that it does not substantiate respondents' advertising representations of weight losses achievable through the use of their X-11 tablets. The complaint in *Alleghany Pharmacal* did not allege that claims of specific and significant weight losses of virtually any amount from the use of diet pills or tablets were false. The issue was whether "Hungrex" tablets, the active ingredient of which was phenylpropanolamine, had any significant pharmacological value as an appetite depressant or weight-reducing agent, or were adequate or effective in the treatment, control or management of obesity. 75 F.T.C. at 997. The hearing examiner thought that the evidence was conflicting and that the allegations of the complaint had not been established by a preponderance of the evidence. 75 F.T.C. at 1034. On review, the Commission expressly disavowed any opinion "as to the accuracy of [these] findings and conclusions," but dismissed the complaint. The Commission, on the hearing examiner's recommendation, [38] however, ordered that the cease and desist order issued earlier in *Alleghany Pharmacal,* 55 F.T.C. 705 (1958), remain in effect. That order prohibited dissemination of any advertisements for "Hungrex" which represented, directly or indirectly, "that any predetermined

weight reduction can be achieved by taking or use of said preparation for a prescribed period of time." The *Alleghany Pharmacal* case does not provide a reasonable basis for the representations of weight loss contained in respondents' X-11 advertisements.

62. The *Carlay* decision, *supra,* did not provide a reasonable basis for respondents to hold out to substantially all users of the X-11 tablets the prospect of significant weight losses of virtually any amount. The product in *Carlay* was simply a candy-vitamin product, did not contain phenylpropanolamine, and has no bearing whatever on the truthfulness of respondents' advertisements for their X-11 tablets.

B. Medical texts and references provided no reasonable basis from which to conclude that substantially all users of X-11 tablets would lose a significant amount of weight

63. Excerpts from a number of authoritative medical references and texts were received in evidence. Having reviewed their individual and cumulative import, it is the finding of the law judge that they did not provide a reasonable basis from which respondents could conclude that substantially all users of X-11 tablets, containing phenylpropanolamine (25 mg) and methylcellulose (25 mg), would lose a significant amount of weight.

64. The 1962-63 Edition of *Drugs of Choice* by Drs. Walter Modell and George G. Reader (CX 92), a reliable text of widespread circulation and use in the [39] medical profession, devotes an entire chapter to anorexiants and the problem of obesity. The chapter commences by observing that the designation "anorexigenic" to a "group of drugs in common use is unfortunate because it implies a precise pharmacologic action on the central nervous system which has never been demonstrated" (CX 92, pp. 1-2). Taking up the properties of specific anorexiant drugs, Drs. Modell and Reader include phenylpropanolamine in the category of "amphetamine-like drugs" (CX 92, p. 5), note that it tends to elevate blood pressure and that this characteristic "limits its usefulness in the treatment of obesity," and state that (CX 92, p. 7):

> [a]lthough it is used in over-the-counter remedies for obesity, such as Regimen tablets, Du-Dol, and R_x 121, the amount of phenylpropanolamine which they contain is too small to exert any pharmacologic effect at all.

In their 1966-67 Edition of *Drugs of Choice,* Drs. Modell and Reader added to the remarks under phenylpropanolamine concerning "over-the-counter remedies for obesity" that (CX 93):

[t]hese nostrums have been, or are likely to be, removed from the market because of unsupportable and in some cases grossly illegal advertising claims.

An almost identical statement was repeated in the 1972–73 Edition of their text (CX 94).

65. The *Pharmacologic Basis of Therapeutics* by Drs. Goodman and Gilman, 4th Edition (1970)(CX 95), is another authoritative and reliable text used by the [40] medical profession (Dr. Margen, Tr. 219; Dr. Drenick, Tr. 471). In a section on "Obesity and Weight Reduction," Drs. Goodman and Gilman state that various "sympathomimetic and related drugs" had been used but "[t]hese appetite depressants are of no value without an accompanying stringent dietary regimen," and that "without consistent supervision no prescribed regimen of drug or diet is predictably successful" (CX 95C). Drs. Goodman and Gilman do not include phenylpropanolamine in their list of "anorectic drugs" (CX 95D). In the 5th Edition of their text (1973) (CX 96), Drs. Goodman and Gilman note that "[w]hatever the etiology of obesity, a factor common to all cases is necessarily an intake of amounts of food that supply more energy than the body uses" (CX 96, p. 6). They then repeat statements in the earlier edition that appetite depressants are of "no value" in the areas of obesity and weight reduction without a "stringent dietary regimen." Again, phenylpropanolamine is not included in their discussion of "anorectic drugs" (CX 96, pp. 6–7).

66. The *AMA Drug Evaluations,* First Edition, 1971, published by the American Medical Association (CX 97), is another authoritative and reliable reference work widely used by the medical profession and available to respondents (Dr. Margen, Tr. 219; Dr. Drenick, Tr. 471). This text states bluntly in its chapter on "Anorexiants" that phenylpropanolamine "is probably ineffective in the dose provided (25 mg)."

67. In December 1972, the FDA published and widely circulated a Drug Bulletin titled *Anorectics Have Limited Use in Treatment of Obesity* (CX 101). The FDA's findings applied "to all anorectic drugs," and informed the medical profession and other concerned persons that "all anorectic drugs including amphetamines and methamphetamines" had "limited usefulness in the treatment of obesity." The FDA based its findings on a "unique evaluation of information submitted by the manufacturers of anorectic drugs and a review of the medical literature." After a review of more than [41] 200 drug studies and the records of more than 9,000 patients, the FDA found that "the total impact of drug-induced weight loss over that of diet alone must be considered clinically small," that "patients treated with anorectic drugs lose only a fraction of a pound a week

more than those not taking drugs," and that this "weight loss appeared to be related in part to variables other than the drug, such as the physician-investigator, the population treated and the diet selected" (CX 101).

68. As prior findings disclose, respondents' advertisements communicated to the public the net impression that virtually any amount of weight could be lost through use of X-11 tablets, "5, 10, 25 or more" pounds, even 80 or 83 pounds. These are significant weight losses. They are of a magnitude to be impressive to the seriously overweight or obese, and obviously were held out to the public because of that fact, and the capacity of such representations to sell X-11 tablets. In relation to the large amounts of weight loss represented in respondents' advertising as possible through the use of X-11 tablets, the loss of a fraction of a pound a week is insignificant. As Dr. Drenick observed, it "would not be noticeable to anyone who is significantly overweight" and would be medically meaningless (Tr. 386). Further, there is no reason to believe the loss of an additional fraction of a pound would continue for more than a few weeks, even if it were attributable solely to the use of X-11 tablets, because of the development of drug tolerance and other factors (RX 2, p. 206; RX 14, p. 1; Dr. Drenick, Tr. 356; Dr. Prout, Tr. 682).

69. Respondents introduced excerpts from *Drill's Pharmacology in Medicine,* 4th Edition (1971), which referred to phenylpropanolamine as "active enough to be used for controlling the appetite" (RX 4, p. 2), from Martindale *The Extra Pharmacopoeia,* 26th Edition (1972), an English reference work published by direction of the Council of the Pharmaceutical Society of Great Britain, which concluded [42] a descriptive paragraph of phenylpropanolamine by stating it "has also been given to reduce the appetite in obesity" (RX 5, p. 3), and from *Pharmacology and Therapeutics,* 7th Edition (1970), by Drs. Grollman and Grollman who state that phenylpropanolamine "is used . . . to depress appetite in obesity" (RX 6, p. 2). Dosages for use as an anorectant were not listed in these references.

70. The medical texts and references in the prior finding do not provide support for significant weight losses of virtually any amount held out by respondents' advertising to purchasers and users of X-11 tablets. That a drug is "used" for a purpose cannot be equated with effectiveness for that purpose (Dr. Margen, Tr. 307; Dr. Drenick, Tr. 471). But even if the references in the foregoing finding were to be taken as evidence that phenylpropanolamine had some effectiveness as an appetite suppressant, it does not follow that substantially all users of X-11 tablets would lose a significant amount of weight.

C. Expert testimony disclosed no reasonable basis in medical science from which to conclude that substantially all users of X-11 tablets would lose a significant amount of weight

71. The state of medical experience, knowledge and understanding generally, and in the field of obesity and its treatment, did not provide respondents with a reasonable basis for the representations of weight loss contained in respondents' X-11 advertising. The record contains the testimony of three expert medical doctors, called by complaint counsel, who had long-term experience in the treatment of obesity. Additionally, complaint counsel called an FDA pharmacologist who [43] testified in connection with the FDA Drug Bulletin (CX 101). Respondents called three experts, a medical doctor, a professor of pharmacology, and a professor and researcher specializing in physiological psychology. The testimony of these experts viewed overall discloses no reasonable basis in medical science, in the opinion of the law judge, for respondents to conclude that substantially all users of X-11 tablets would lose a significant amount of weight.

Medical Doctors

Dr. Margen

72. Dr. Sheldon Margen, called by complaint counsel, is a Professor of Human Nutrition, and the 1970-74 Chairman of the Department of Nutritional Sciences, at the University of California at Berkeley. After majoring in zoology and receiving a Master's degree in that science and experimental embryology, he graduated from the University of California Medical School in 1943, and was licensed to practice medicine in California the same year. Dr. Margen subsequently has had a distinguished medical career involving private practice, teaching, lecturing and, in particular, extensive research. He is an authority in the field of human nutrition, metabolism, and the treatment of obesity, and has individually and jointly authored over 85 scientific papers, many in the fields of his expertise. In addition, Dr. Margen has written chapters for a number of scientific texts, and has participated in the writing of a number of others (CX 110). Currently, he is operating, with other researchers at the University of California, a controlled metabolic unit funded by the National Institutes of Health where metabolic studies in human nutrition are conducted. He is also participating in an ongoing, multi-disciplinary obesity program

conducted on an outpatient basis at the University (Dr. Margen, Tr. 129 and 141-43). [44]

73. In Dr. Margen's expert opinion drugs have "no place in the treatment of obesity" because it is not a simple problem capable of being cured by a pill (Tr. 162). If there were a "magic pill," in Dr. Margen's view, "obesity would have disappeared by now" (Tr. 162). Drugs in the treatment of obesity are "essentially placebos in their effect," and are not a helpful or proper therapeutic approach (Tr. 163). According to Dr. Margen, phenylpropanolamine is essentially a placebo, and is useless in treating obesity (Tr. 164-65, 292-95 and 299-302). Dr. Margen saw "no reason to get an individual started" on drugs such as phenylpropanolamine (Tr. 296):

> . . . when the very slight gain which may occur early can just as well be taken care of and overcome by the sympathetic working with a person instead of relying upon just handing out a drug or prescription.

Dr. Margen's opinion that drugs such as phenylpropanolamine are useless in the treatment of obesity are based upon his research and experience over a ten (10) year period, "I would say after about ten years of trial, I gave them up" (Tr. 255).

74. Dr. Margen testified that he agreed (Tr. 241) with the statements under "Obesity and Weight Reduction" in *The Pharmacologic Basis of Therapeutics* (CX 95 and 96) to the effect that appetite depressants were of "no value" in weight reduction "without an accompanying stringent dietary regimen," and that it had been regularly demonstrated that "without consistent supervision" no prescribed regimen of diet is "predictably successful." Dr. Margen also agreed with the *AMA Drug Evaluations* (CX 97) that phenylpropanolamine was "probably ineffective" as an anorexiant in the dose of 25mg provided in X-11 tablets (Tr. 242-43). Dr. Margen testified that epidemiological studies had shown the [45] "break point" between obesity having adverse effects upon health and not having adverse effects upon health was around 20 percent overweight (Tr. 150). Accordingly, Dr. Margen defined a "significant" loss of weight from an epidemiologist's viewpoint as one which returned an individual's weight to "the area of the so-called safe level" (Tr. 151).

Dr. Drenick

75. Dr. Ernst J. Drenick, called as an expert witness by complaint counsel, is a Professor of Medicine at UCLA Medical School, heads the UCLA obesity clinic, and is Chief of Internal Medicine at the Veterans Administration Hospital, West Los Angeles. He graduated

from New York University College of Medicine in 1941, and has been on the faculty of UCLA medical school since 1955. Dr. Drenick's special interest is nutrition and metabolic diseases, and his primary work has been in the field of obesity (Tr. 340-41). He has been involved in the study of obesity since 1962, and from that year to the present has studied overweight patients, admitting them to the hospital and determining how they responded to various nutritional and weight-reduction programs, their needs for vitamins and different food items, and the effect of various treatment methods. He handles an average of 60 to 70 hospitalized patients and 200 to 300 outpatients each year. Hospitalized patients are admitted for two to four months each, and are carefully observed from the standpoint of psychological responses to various methods of treatment, psychologic makeup, including the reasons for abnormal eating habits, and how such habits can best be remedied (Tr. 341-42). He is supported by several technicians, two of whom are graduate students with advanced degrees, and at times is assisted by graduate fellows who are M.D.'s or Ph.D.'s (Tr. 342). Dr. Drenick is an authority in the field of obesity and its treatment. He has written or co-authored 50 scientific papers, most of which have [46] dealt with obesity, weight reduction and associated subjects, including the various psychological processes of obese individuals (CX 114). Dr. Drenick also has prepared chapters for two medical textbooks and performs editorial services as a reviewer for the *Journal of the American Medical Association, American Journal of Clinical Nutrition,* the *Journal of Laboratory and Clinical Medicine,* the *Annals of Internal Medicine, Gastroenterology, Metabolism,* and *Obesity and Bariatric Medicine* (CX 114; Tr. 344–45).

76. Dr. Drenick has been unable to achieve permanent weight reduction and maintenance of normal weight with "any of the so-called appetite suppressants." The only way this has been accomplished has been through dietary restriction in conjunction with increased activity levels, and "prolonged educational programs to re-educate the patient to normal eating habits." Such re-education requires a close, ongoing relationship between the patient and the individual supervising his or her progress (Tr. 353). Without such supervision the results are "pitiful" (Tr. 354). Over a period of two years better than 90 percent of those treated return to their original weight or have increased beyond what they started with (Tr. 354). Without continuing "follow-up" the failure rate is "almost universal" (Tr. 354–55). In Dr. Drenick's experience the obese patient has to be taken under the care of a doctor or leader of a weight-reduction program, such doctor or leader has to make sure the patient is well

motivated, and such motivation has to be maintained to make sure the patient does not "backslide" (Tr. 355).

77. Dr. Drenick knew of no drug that had "significant results or benefits in weight reduction." Drugs in the "appetite suppressant family," such as phenylpropanolamine, "have a very limited span of effectiveness even if a mild effectiveness were present" (Tr. 356). In Dr. Drenick's professional experience (Tr. 356): [47]

> The weight loss usually is very, very minor and at the end of five or six weeks the patient realizes that the drug isn't doing any good. He becomes disappointed and is no better off and perhaps worse off.

78. Dr. Drenick agreed with statements in the medical literature that phenylpropanolamine was "ineffective" in achieving weight loss, and shared the opinion that "it should not be used in the treatment of obesity" (Tr. 368–69). Dr. Drenick also agreed with *Drugs of Choice* (CX 92, 93 and 94) testifying that phenylpropanolamine was "of questionable value or of no value" (Tr. 369). He further agreed with *AMA Drug Evaluations* (CX 97) that phenylpropanolamine was "probably ineffective in the dose provided (25 mg)" (Tr. 372).

79. Dr. Drenick testified that a "significant" weight loss must be a weight loss which was meaningful to the patient and significant from a clinical point of view (Tr. 356). To illustrate, Dr. Drenick cited the case of a 350-pound patient who lost 5 or 6 pounds. Such a weight loss was measurable on the scales, but "for the patient medically, it is totally insignificant" (Tr. 357). Dr. Drenick testified (Tr. 357):

> You can say, well, I have given him amphetamines, he has lost seven pounds in weight. Therefore, that is a great result. It is totally insignificant medically but statistically you can say there was a significant weight los[s]. [48]

Dr. Prout

80. Dr. Thaddeus Prout, the third medical expert called by complaint counsel, graduated from Harvard Medical School in 1948. After training in general internal medicine, he studied for three additional years as a fellow in the fields of endocrinology and metabolism. He is currently Chief of Medicine, Greater Baltimore Medical Center, and Associate Professor of Medicine at Johns Hopkins University School of Medicine. Dr. Prout has taught at Johns Hopkins for many years, and for a period was a full-time faculty member. He is currently Director, Metabolic Division, Moore Clinic, The Johns Hopkins Hospital; Consultant in Endocrinology, Veterans Administration Hospital, Perry Point, Maryland; Consultant in Endocrinology, Veterans Administration Hospital, Baltimore, Maryland; Consultant, Department of Health, Education and

Welfare; Consultant, Food & Drug Administration, National Institutes of Health; and has served as a consultant for the Bureau of Dangerous Drugs and Narcotics (CX 119; Tr. 670). Dr. Prout is an authority in the fields of endocrinology and metabolism, and is Chairman of the FDA's Committee on Endocrine and Metabolic Drugs (Tr. 668–72; CX 119).

81. In 1972 Dr. Prout headed a panel of experts established to advise the FDA on the safety and efficacy of anorectic drugs (CX 120; Tr. 680). This panel, "Consultants on Anorectic Drugs," reported to the FDA in the Fall of 1972 (CX 120). The report of Dr. Prout's panel resulted in the "FDA Drug Bulletin" being circulated to the medical profession, and to other interested groups and organizations in December 1972 (CX 101; Tr. 687).

82. The advisory panel of experts chaired by Dr. Prout reviewed the "best evidence available" on anorectic drugs and all the information submitted to [49] the FDA, including studies, tests, and histories of individuals involving "something in excess of 10,000 patients" (Tr. 723–27). The drugs studied by the panel included amphetamine-related drugs, known also as sympathomimetic amines. Phenylpropanolamine is of the same class although it was not specifically a subject of the panel's study (Tr. 676). The amphetamine-type drugs studied were stronger than phenylpropanolamine in their effects on the human body. According to Dr. Prout "[a]ll the evidence that we have suggests that it is less potent as an anorectic agent than is the parent compound" (Tr. 708). The panel's findings applied to "all anorectic drugs" including phenylpropanolamine (CX 101).

83. Although there were some members "who would have preferred to make the statements stronger than we made them" (Tr. 727), Dr. Prout's panel of experts were in agreement that anorexiants had a "clinically trivial" effect on weight loss (CX 120). The "increased weight loss of drug treated patients over placebo treated patients was only a fraction of a pound a week," and the panel concluded that ". . .the total impact of drug-induced weight loss over that of diet alone must be considered clinically trivial" (CX 120). Dr. Prout testified that the panel, after reviewing the massive amount of data available to it, found (Tr. 681–82):

> . . .that in general, one would see somewhere between 0.3 to 0.4 pounds per week on the average for these short term studies. Considering the fact that many of these patients were 100 percent over body weight, that was, in fact, a trivial reduction in their total body overload.

Losses of 0.3 or 0.4 of a pound a week applied for short periods and would tend to decrease for greater time periods (Tr. 682). [50]

84. The final report to the FDA by the "Consultants on Anorectic Drugs" stated that the possible origins of the small weight loss described in the preceding finding were not established and that (CX 120):

> . . .The increased weight loss appears to be related to variables other than the drug prescribed, such as the physician-investigator, the population treated, and the diet prescribed. Studies do not permit conclusions as to the relative importance of the drug and non-drug factors on weight loss.

85. Dr. Prout considered that a weight loss due to the action of an anorexiant or other drug, that is, the "additional effectiveness of an anorectic agent over that of a placebo or diet plus placebo" of a pound a week would be "clinically useful and quite significant," but such a drug or agent "is certainly not known at the present time" (Tr. 690–91). He had used anorectic drugs in treating overweight persons in the course of his medical practice, but "without any success" so he had discontinued them "having found no usefulness for them" (Tr. 722–23).

Dr. Fineberg

86. Dr. Seymour K. Fineberg, an expert medical doctor called by respondents, is a physician practicing in New York City and specializing in internal medicine with particular emphasis in the fields of diabetes, obesity or metabolic disease, and cardiology. He graduated from the University of Arkansas in 1936 and obtained his M.D. in 1940. After receiving his M.D. he spent two years in a general rotating internship, followed by a two-year residency in internal medicine, [51] and then graduate study in basic sciences at New York University School of Postgraduate Medicine (Tr. 1313). He is currently Clinical Associate Professor of Medicine at New York Medical College. Dr. Fineberg has served as a consultant in the field of anorexigenic drugs, and has advised pharmaceutical manufacturers who were evaluating anorexigenic drugs presently on the market (Tr. 1314). He has been a consultant for the AMA Council on Drugs and worked on the chapter on anorexigenic agents in the 1973 Edition of *AMA Drug Evaluations.* Dr. Fineberg has published about 40 medical papers, the bulk of them being in the fields of obesity, diabetes and nutrition (RX 44; Tr. 1314). He has a private practice, some of which relates to obesity, which takes about 25 percent of his time (Tr. 1315).

87. Dr. Fineberg became interested in appetite suppressants in

the treatment of diabetes in 1958. He wrote an article, "Obesity-Diabetes and Anorexigenics," published in the *Journal of the American Medical Association* in February 1961 in which he reported that phenmetrazine hydrochloride and diethylpropion were "significantly anorexigenic" (RX 43). Although Dr. Fineberg believed that anorexiants relieved the symptoms of hunger and produced weight loss (Tr. 1325–26, 1328–29, 1344), phenylpropanolamine has not been among the drugs used or studied by him (Tr. 1323, 1336). Dr. Fineberg's knowledge of phenylpropanolamine is based on its molecular structure and the fact that it is a member of the phenethylamine group (Tr. 1342).

88. In another article, "Anorexiant Drugs In Perspective," published in 1967 in the *Journal of the American Geriatrics Society* (RX 46), Dr. Fineberg sought "to teach the medical profession where they have been making mistakes in the treatment of obesity and in their use of appetite suppressants," that those drugs were widely used "despite what all has been said about them," and that "if they do have a small but definite role to play" they "should be used properly" [52] in order to "obtain the right effect in the overall treatment of obesity" (Tr. 1348–49). In this article Dr. Fineberg stated that anorexigenic drugs were useful "only during the initial, relatively short weight-reduction period in the course of lifetime control," and that the "sole purpose" of the drug was "to provide symptomatic relief" (RX 46, p. 3). In concluding his article Dr. Fineberg states (RX 46, p. 7):

> The anorexigenic drug plays a relatively short, minor, though often integral, role in the treatment of obesity, a disorder which requires lifetime control and cannot be cured. The foundation for permanent weight control is an education in calories, dietetics and nutrition and in the acceptance of a new way of life. Appetite suppression by drugs is used only to relieve the discomfort of caloric restriction during the early stages of education and mental adjustment.

Dr. Fineberg did not mention phenylpropanolamine in his discussion of "anorexiant" drugs, although many others are described or mentioned including dextro-amphetamine, methylamphetamine, phenmetrazine, and diethylpropion.

89. In an article in *Drug Therapy* in March 1973, cast in a question and answer format, Dr. Fineberg wrote that the only purpose of appetite suppressing drugs was to "relieve the symptoms of physiologic hunger," and they were only a "crutch" to help an obese patient beyond the initial phase of treatment (RX 45). He stated that obesity should be thought of as a condition "which requires continuous treatment," and that anorexigenic drugs are not useful in helping a patient maintain an initial weight loss, but are

only useful "to relieve [53] the discomfort associated with dieting." All in all, Dr. Fineberg felt that the medical profession did not have a great deal to offer the obese patient (RX 45). Dr. Fineberg also testified that he believed appetite suppressants had an effect, and if properly used and properly presented to an obese patient, often meant "the difference between success and failure in the treatment of a patient's obesity" (Tr. 1329). The appetite suppressants do not take off weight but, in Dr. Fineberg's opinion, the "symptoms are relieved that are produced by hunger" (Tr. 1322).

90. Dr. Fineberg used prescription drugs such as phenmetrazine, dextroamphetamine, and diethylpropion as appetite suppressants (Tr. 1382). He had never been impressed by anything he read about phenylpropanolamine as an anorexiant, and had never used it, explaining that he wanted to use a drug "most likely to succeed and do the job that I am asking it to do" (Tr. 1384; see also Tr. 1336, 1341 and 1383). He "had no interest in going to an older member of this family which had never been thought to be a very strong or potent member of that family" — "Why should I go back and use something which I feel is not as efficacious as the one I had in hand" (Tr. 1383). Dr. Fineberg could not say whether phenylpropanolamine was effective in a 25 mg dosage tablet for the "normal run of people" (Tr. 1384). However, based on its molecular structure and upon medical references, Dr. Fineberg believed it to "have some anorexigenic properties" (Tr. 1342). Nevertheless, Dr. Fineberg testified that it would be "impossible" for him to predict what effect the ingestion of a tablet containing phenylpropanolamine prior to a meal would have on the food eaten by a person at such meal (Tr. 1352 and 1384). The dosage of an appetite suppressant of any type, in Dr. Fineberg's experience, is a "widely variable thing individually" and must be "tailored to the individual" (Tr. 1345, 1352 and 1388). [54]

Other Experts

Dr. Silverman

91. Dr. Harold I. Silverman, a Professor of Pharmacology at Massachusetts College of Pharmacy, the Massachusetts College of Optometry, and Boston University Medical School, was called as an expert witness by respondents Porter & Dietsch, William H. Fraser, Kelly Ketting Furth and Joseph Furth. He has published approximately 75 articles and a text on pharmacology. Dr. Silverman graduated from the Philadelphia College of Pharmacy in 1952 where he also received his Ph.D. in 1956 (RX 35; Tr. 1101–04). He is not an M.D. and does not treat patients for overweight or obesity.

92. Among Dr. Silverman's publications is an article published in the *American Journal of Pharmacy* in 1963 entitled "Phenylpropanolamine–Misused? Or Simply Abused?" (RX 36). Dr. Silverman testified that his main purpose in writing this article was to criticize the "Fazekas" report, published in 1959, which had concluded that phenylpropanolamine was ineffectual as an appetite suppressant (Tr. 1148). Dr. Silverman reviewed the literature, both national and international (Tr. 1105), and wrote that of all the anorexiants, amphetamine and its analogs are the most effective (RX 36, p. 3). Reviewing the literature, Dr. Silverman found favorable, as well as unfavorable, comments regarding the appetite-suppressant qualities of phenylpropanolamine, noting in the process that the FDA had "gone on record" in stating that phenylpropanolamine was "worthless as an appetite depressant" (RX 36, p. 8). One of the references listed by Dr. Silverman (RX 36, p. 11, note 15) was a 1939 article which he quoted as reporting that phenylpropanolamine was "[e]ffective in controlling the appetite of patients on an obesity diet." The author of this article, Dr. Hirsh, had later testified publicly before a Subcommittee of the House Committee on Government Operations investigating advertising of weight reducing [55] products in 1957, six years before Dr. Silverman's article was published, and had changed his opinion. See *False and Misleading Advertising* (Weight Reducing Preparations), *Hearings before a Subcommittee of the Committee on Government Operations,* House of Representatives, 85th Cong., 1st Session, August 2, 6, 7 and 8, 1957, pp. 56–63. Dr. Hirsh stated to the House Subcommittee that firms marketing reducing pills "endeavor to exploit phenylpropanolamine," and that a dose of 25 mg of phenylpropanolamine taken three times daily "would exercise no appetite depressant effect of significance for the great vast majority of persons." Although Dr. Silverman's article referenced (RX 36, p. 11, note 7) the Committee hearings, the disparity between the foregoing statement of Dr. Hirsh before the House Committee in 1957, and the 1939 article quoted by Dr. Silverman, was not noted. In concluding his article, Dr. Silverman made a number of points critical of the "Fazekas" study, questioning whether that study warranted condemnation of phenylpropanolamine, but making no claims of specific amounts of weight loss associated with that drug.

93. Dr. Silverman testified that, in his opinion, phenylpropanolamine is effective as an appetite depressant in 75 mg daily dosages (three X–11 tablets), and that use in conjunction with a dietary program of 1,200 calories per day would bring about a significant decrease in weight with time (Tr. 1107). He also testified that he had

no question that anorectic preparations were very useful in helping individuals lose weight (Tr. 1111). Dr. Silverman regarded statements questioning the value of anorectic drugs or describing them as placebos as "frequently made unfortunately because of certain intimidation that has occurred in the field of drug therapy" and because there is "unfortunately a small group of persons who try to develop their opinions and unfortunately sometimes manage to get their opinions published in the literature" (Tr. 1110). [56]

94. Dr. Silverman had conducted a study evaluating phenylpropanolamine and a placebo over a several week period (RX 3). He concluded that phenylpropanolamine was effective as an anti-obesity agent when used as it was in his study (Tr. 1120). Dr. Silverman's study was received in evidence, and will be considered in the following section of this decision along with studies of Dr. Hoebel.

95. Dr. Silverman agreed with the statements in *Drill's Pharmacology in Medicine* (RX 4), *The Extra Pharmacopoeia* (RX 5), and *Pharmacology and Therapeutics* (RX 6), that phenylpropanolamine is used in the treatment of obesity (Tr. 1108–09). Referring to the *FDA Drug Bulletin* (CX 101), Dr. Silverman testified that he was familiar with this publication and its conclusions. He testified that the FDA had concluded "that anorectic drugs are acceptable and useful agents for the reduction of appetite and useful as a proven measure for those people who are obese" (Tr. 1111). In fact, the *FDA Drug Bulletin,* as earlier described, concluded that anorectic drugs were of "limited usefulness" in the treatment of obesity, that their effects "must be considered clinically small," that patients treated with such drugs lost "only a fraction of a pound a week more than those not taking drugs," that the fraction of a pound weight loss of those taking drugs "appeared to be related in part to variables other than the drug," and that the weight loss "declines in succeeding weeks" (CX 101).

Dr. Hoebel

96. Dr. Bartley G. Hoebel is a physiological psychologist, and a Professor in the Department of Psychology at Princeton University. His field of specialization involves the study of the relationship between brain and behavior. He obtained his Ph.D. at the University of Pennsylvania in 1962, and taught at [57] that institution briefly before moving to Princeton in 1963 where he became a full professor in 1970 (RX 37; Tr. 1176–77). He has authored or co-authored about 35 publications (RX 37).

97. Dr. Hoebel testified it was his opinion, based on his studies, that "people interested in weight loss and knowing that a pill might

be involved in suppressing appetite is being [sic] under test" will eat less (Tr. 1195), and that "people taking this pill [containing phenylpropanolamine] will lose some [weight], on the average, and that individuals, some individuals will lose a lot" (Tr. 1296). People following a restricted diet would be happier, according to Dr. Hoebel, if they used an appetite suppressant, but the effects of the diet and the appetite suppressant have not been scientifically demonstrated to be additive (Tr. 1199–1200). Dr. Hoebel emphasized, however, that his studies demonstrated the effectiveness of phenylpropanolamine to bring about weight loss only under the conditions of his experiments and for short time periods (Tr. 1241).

98. Contrary to his earlier statement, published as recently as 1975, that phenylpropanolamine "has never adequately been proven effective" (RX 41, p. 7–8), Dr. Hoebel in this proceeding stated that such proof existed. Recent studies by himself, Dr. Silverman and a Dr. Palmer, according to Dr. Hoebel, support the view that phenylpropanolamine is an effective anorexiant (Tr. 1205).

99. Dr. Hoebel disagreed with statements made in *Drugs of Choice* that phenylpropanolamine is ineffective in 25 mg dosages, that obesity is a "singularly human trait," and could be of psychiatric origin and therefore not amenable to treatment with drugs. He also disagreed with the statement that no anorectics are effective without simultaneous control of food intake (Tr. 1223–24). Dr. Hoebel testified that these and [58] other statements of Dr. Modell's were "based on old, inadequate studies which have led him to false conclusions, numerous false statements and a basic bias" (Tr. 1220). Dr. Hoebel also testified that the other medical references referred to during his questioning suffer the same defects as *Drugs of Choice* since they rely on this major work for the accuracy of their statements. Dr. Hoebel testified that medical textbooks lead people to conclude that phenylpropanolamine is not effective because they were written (Tr. 1225):

> . . .without access to the current or the latest data and in some cases, by people who had very strong prejudices about the nature of obesity in humans and the fact that in their minds, it is something that is psychic and not amenable to drug treatment.

Dr. Hoebel's studies (RX 1 and 2) will be considered in detail in the following section of this discussion.

Dr. Sorer

100. Dr. Heinz Sorer, called as an expert by complaint counsel, is a pharmacologist on the drug abuse staff of the FDA, Division of Neuropharmacological Drug Products (Tr. 616). Dr. Sorer's work

entails safety evaluations of drugs, including appetite suppressants, which affect the central nervous system (Tr. 617). Between 1966 and 1972, Dr. Sorer was concerned with an evaluation of sympathomimetic amines undertaken by the FDA to gather information regarding potential abuse of these drugs, and to formulate an FDA policy regarding evaluation of their efficacy (Tr. 618–19). The culmination of this FDA effort was CX 101, the *FDA Drug Bulletin,* discussed in detail earlier herein by Dr. Prout who headed the expert panel evaluating these drugs. Dr. Sorer testified that the effects of the sympathomimetic amine drug group, of which phenylpropanolamine is a member, varied "from individual to individual" (Tr. 630). [59]

D. Studies by experts called by respondents did not provide a reasonable basis from which to conclude that substantially all users of X-11 tablets would lose a significant amount of weight

The studies of phenylpropanolamine by respondents' expert witnesses, Drs. Silverman and Hoebel, were received in evidence, being offered by respondents as substantiation for the weight-loss claims made in X–11 advertisements (RX 1, 2 and 3)

(a) *Dr. Silverman's Study*

101. "A Double-Blind Clinical Evaluation of a Phenylpropanolamine-Caffeine-Vitamin Combination And A Placebo In The Treatment of Exogenous Obesity" (RX 3), published in *Current Therapeutic Research,* Vol. 17, No. 6, June 1975, is a study which Dr. Silverman conducted in collaboration with two medical doctors. Inasmuch as this study was published in June 1975, it obviously could not have provided a reasonable basis for claims for X–11 tablets in advertisements of respondents disseminated in 1968 and subsequent years prior to its publication. Nevertheless, such a study would bear upon the propriety of an order in this proceeding if, in fact, it provided a reasonable basis for the advertising claims. This was not the case, however, for Dr. Silverman's "double-blind" study had some dubious aspects, raising questions as to the reliability of its conclusions. Furthermore, even if this were not the case, the study did not provide a reasonable basis for the representations in respondents' advertisements that users of X–11 tablets could lose significant, large amounts of excess weight of virtually any amount. [60]

102. Two allegedly parallel groups of exogenously obese adults

were employed in the study. One group was given a test preparation containing phenylpropanolamine (25 mg), caffeine and multi-vitamins while the other group received a placebo tablet. Both groups were also given a 1,200 calorie diet plan and instructions on its use. Dr. Silverman reported that over a "four-week period" while on the test preparation the "median" weight loss of males was 3 1/2 pounds greater than males on the placebo. The "median" weight loss of females on phenylpropanolamine was 2 pounds greater than the median weight loss of females on the placebo. Dr. Silverman concluded that the results produced a "statistically significant difference at the $<$ 0.05 probability level in the weight loss of females using the test preparation compared to those using the placebo," but "no significant difference in the case of males" (RX 3, pp. 538–39).

103. Both Dr. Margen and Dr. Drenick analyzed the study of Dr. Silverman (Dr. Margen, Tr. 209–17; Dr. Drenick, Tr. 390–98). Dr. Margen found that the combined treatment group had a difference of 1 1/2 pounds in 4 weeks which comes out at a .05 probability, the lowest possible range of significance, "you can't have anything worse than that in terms of probability" (Tr. 213). Dr. Margen further found that the greatest weight loss of anyone in the study occurred in a female who was on the placebo (Tr. 213). Among the males in the study "there was no significant weight loss between the placebo and the PPA [phenylpropanolamine]" (Tr. 214). Dr. Margen testified (Tr. 214):

> What is even more important is that, in the case of the males, there was no significant weight loss between the placebo and the PPA. In the case of the females, again, it was at the 10 to 20 probability range and certainly statistically in one case absolutely nothing happened. Clinically you have a weight difference which is of [61] absolutely no significance and, lastly, and I think what was sort of curious, the tremendous variability which you see in patients losing weight, and if one wants to make a joking point one can say that the greatest weight loss was with the female on the placebo."

104. Dr. Silverman reported his results in terms of a "median." In Dr. Drenick's professional judgment, use of a median to assess weight changes in such a study is unacceptable as it is not a proper scientific method for evaluating the test results (Tr. 390 and 398). This is a serious defect in the study because, as Dr. Drenick testified (Tr. 392–93):

> Another reason why this study is uninterpretable to me is that the authors used a way of assessing weight changes that are really not acceptable. They talk about median weights and median weight losses.

* * * * * * *

A median weight loss of eight pounds means absolutely nothing because I don't know what the other people on this side or on this side of the man in the middle lost. Since all of the weight losses are given as median weight loss I really don't know what he is talking about and I cannot say what his conclusions are or have any meaning at all.

(See also, Dr. Margen, Tr. 212). [62]

105. The characteristics of the subjects who participated in Dr. Silverman's study were so varied in their body builds and weights as to render meaningless the fractions of a pound of weight loss per week Dr. Silverman attributed to phenylpropanolamine (Dr. Drenick, Tr. 391–92). The females in the group on the test preparation had a median starting weight 12 pounds heavier than the median starting weight of females in the placebo group. Dr. Drenick testified that heavier individuals tend to lose more weight when following a diet simply because their caloric deficit is greater (Tr. 391). Dr. Drenick found that almost half (46 percent) of the females on the placebo were small framed, compared with one-quarter (24 percent) of those on the test preparation. Only 17 percent of the placebo group females were heavy framed contrasted with 32 percent of the group on the test preparation (Tr. 390–92). This is significant since "a small framed individual who is overweight carries a lot more fat" than a heavy framed individual (Tr. 391). The test groups were so dissimilar in significant characteristics as to render the study meaningless. Dr. Drenick testified (Tr. 392):

This may be an accident in their selection but it certainly is not true that these are comparable groups and for this reason any assessment of differences in weight loss is meaningless because you are not judging identical groups. They are totally dissimilar.

106. The small weight losses reported by Dr. Silverman of those on the test preparation over those on the placebo may even have been due to a diuretic effect (Dr. Drenick, Tr. 393–94).

107. Dr. Silverman's study further assumed that the crucial period in any reducing regimen was "usually during the initial part of the program" (RX 3, p. 541). [63] This is contrary to the prolonged and extensive experience of both Drs. Margen and Drenick in treating obese and overweight persons. Dr. Drenick testified (Tr. 397):

Everyone knows that obese individuals go on diets time after time after time and usually they lose a few pounds in the first few days. But the extended period, the long haul, this is where they fail.

Dr. Margen testified that to say the initial period of a dietary

regimen was the most crucial period was wrong "because the most crucial period is the long-term period" (Tr. 214). According to Drs. Drenick and Margen, Dr. Silverman thus tested phenylpropanolamine in the period where it is easiest to lose weight, and did not follow his test subjects over a more extended period of time.

108. Additional and thoroughly complete professional evaluation of the results published in this study were made impossible by Dr. Silverman's refusal to allow complaint counsel an opportunity to examine the study's underlying data (Tr. 1131).

109. Dr. Silverman's study, in any event, provided no basis for respondents' representations of weight loss from use of their X-11 tablets. Loss of one-half, or less than one-half a pound a week, over a 4 or 5-week period for an obese person is "clinically trivial" (see CX 101, 120), particularly in the absence of evidence that such loss can be continued.

(b) *Dr. Hoebel's Studies*

110. Dr. Hoebel, whose testimony has already been discussed to some extent, conducted experiments involving phenylpropanolamine with both animal and human [64] subjects. Before conducting studies with human subjects Dr. Hoebel experimented with phenylpropanolamine on rats. Four of his studies with rats were offered by respondents and received in evidence (RX 38-42). Dr. Hoebel's experiments with rats involved doses of phenylpropanolamine 100 to 1,000 times greater, on a relative basis, than the standard 25 mg dosage used with human subjects, and in many of the animal experiments the drug was injected directly into the brain (Dr. Margen, Tr. 186). Under these circumstances, loss of appetite or weight loss obtained by Dr. Hoebel in rats does not imply similar results in humans from oral ingestion of far smaller amounts of phenylpropanolamine. Moreover, overweight or obesity in humans derives from a variety of causes to which rats are not subject. As Dr. Drenick testified (Tr. 396):

> . . .making a rat lose weight does not mean that you are going to have a human losing weight because obviously humans overeat for reasons that are totally different from a rat.

111. Dr. Hoebel has published two papers dealing with human subjects, "Appetite Suppression By Phenylpropanolamine In Humans" (RX 1) and "Body Weight Decreased In Humans By Phenylpropanolamine Taken Before Meals" (RX 2), both in *Obesity/Bariatric Medicine,* Vol. 4, No. 5, 1975. From the foregoing date it is clear that these are recent studies and could not have provided a

reasonable basis for X-11 advertising claims made prior to their publication. However, like the Silverman study, Dr. Hoebel's work would bear upon the propriety of an order in this proceeding if it did, in fact, support respondents' advertising claims.

112. Both of Dr. Hoebel's studies were published "under the auspices of the Brain Research Instruments Company," Dr. Hoebel's private consulting firm (RX 1, p. 192, note 2 and RX 2, p. 200, note 2). The University of Princeton had no connection with either of them and they were not submitted to or reviewed by [65] any of Princeton's faculty committees (Dr. Drenick, Tr. 387-88; Dr. Hoebel, Tr. 1262). In this connection, Dr. Drenick testified (Tr. 387-88):

. . .I have never before seen a publication in medical literature where the author under his credit lines has to state or states that this study was not performed under the auspices of the Investigators [sic] Institution. Dr. Hoebel is a member of the faculty of the Department of Psychology of Princeton University and he prints a statement on Page 192 which says,"This study was performed under the auspices of the Brain Research Instruments Company, 207 Hartley Avenue, Princeton, with support from the Alleghany Pharmacal Corp. of New York, New York, and not Princeton University nor the Medical Center at Princeton,"which indicates to me that his institution and the Medical Center associated with Princeton University did not sanction or approve of this article.

113. Alleghany Pharmacal Company and respondent Porter & Dietsch have provided financial support for Dr. Hoebel's work with phenylpropanolamine. Dr. Hoebel had contacted each of these firms and sought financial support. Alleghany Pharmacal, as already noted, markets "Hungrex," a diet pill containing phenylpropanolamine in the same dosage as X-11 tablets (Tr. 1293; see also, CX 123). After Dr. Hoebel had been doing research with phenylpropanolamine on rats for several years, he saw "Hungrex" pills on sale in a drug store and testified that he (Tr. 1179): [66]

. . .got the name of the company off the books [boxes], called them up and suggested they should be supporting our research and, in fact, they did. This was the Alleghany Pharmacal Company. They gave a grant to Princeton University to continue this work with animals.

They also contacted me later and asked if I would be interested in running a study to test the efficacy of this drug in human beings.

On February 10, 1974, Dr. Hoebel wrote to Alleghany over the letterhead of his company, Brain Research Instruments Co., seeking additional funds stating that (CX 209):

Considering that Alleghany's future all hinges on F.D.A. decisions, my publication of the Brain Research Instruments Co. and Princeton University reports is the best buy in advertising you have.

Dr. Hoebel's study results on phenylpropanolamine have been used by "Alleghany Pharmacal in their advertising" (Tr. 1299).

114. Dr. Hoebel's research has also been supported by respondents in this proceeding, Porter & Dietsch. After the complaint issued in this matter, Dr. Hoebel was introduced to individual respondent William H. Fraser, president of Porter & Dietsch. Dr. Hoebel later contacted Porter & Dietsch and suggested that that firm support his research. Dr. Hoebel testified (Tr. 1288): [67]

Q. When did you begin conducting a study for Porter and Dietsch, or when were arrangements made for you to conduct such a study?

A. This fall [1975]. Well, more specifically, when this case came up, and I was introduced to Mr. Fraser of Porter and Dietsch.

My parents live in Minnesota, in St. Paul, so when I visited them, I went to visit him and asked him if he would like to support research at Princeton University, and he said yes. He has.

With respect to his letter to Alleghany Pharmacal Company, Dr. Hoebel testified (Tr. 1291):

It is my opinion that anyone that is selling a drug for human use has a responsibility to support research on that product.

The grant from Porter & Dietsch or Mr. Fraser, although in name to Princeton University, is specifically earmarked for Dr. Hoebel's research (Dr. Hoebel, Tr. 1290).

115. The first study of Dr. Hoebel, "Appetite Suppression By Phenylpropanolamine In Humans" (RX 1), involved a "double-blind" experiment in which test subjects were given either a placebo or a pill containing phenylpropanolamine 30 minutes before being instructed to begin a lunch of Metrecal. The amount of Metrecal ingested at each lunchtime session was measured. In the initial phase of the experiment the test subjects were told by Dr. Hoebel that the purpose [68] was to test the effect of a drug on food intake, and that the subjects would be paid. After a number of procedural refinements were introduced, a difference of 38 cubic centimeters was found between the mean noontime intake of 669 cc's Metrecal for subjects on phenylpropanolamine and 707 cc's for those on the placebo (RX 1, p. 195). Dr. Hoebel reported that "phenylpropanolamine can decrease meal size in a selected population such as we sampled when they are instructed to use the drug according to the instructions given when sold over the counter" (RX 1, p. 196).

116. In evaluating this study, Dr. Margen testified that he disagreed with the statistical methodology employed in reporting

test results. He wrote on the paper when studying it that the statistical methodology was "rigged," and testified (Tr. 179):

. . .as far as the paper is concerned I cannot utilize the data and find that I can come up with any of the conclusions which the author did . . .

Use of a "mean" without any mention of individual variability of food intake was, in Dr. Margen's opinion, a serious defect since any individual differences in a test of this type would be highly significant (Tr. 180–81). Additionally, when further refinements were made in the experimental design by Dr. Hoebel, absolutely no difference in Metrecal consumption was reported and Dr. Margen therefore concluded that "in this paper I cannot find that there is any significant demonstration of the effectiveness of PPA" (Tr. 184). Dr. Margen concluded (Tr. 184): [69]

So here you have a paper which is published without any consideration to variability, and I don't see that the variability was handled in the entire matter of statistics or statistical analyses, and you come up with a very inconclusive thing.

See generally, Dr. Margen (Tr. 174–85).

117. Dr. Drenick also analyzed Dr. Hoebel's first study (RX 1). When asked if this study indicated that phenylpropanolamine is an effective appetite suppressant in humans, Dr. Drenick testified (Tr. 374–75):

I don't think that this article proves that at all, and the reason for my opinion is as follows: Dr. Hoebel treated three groups of subjects. To one group he gave phenylpropanolamine. To another group he gave a placebo but told them that they were going to test the effect of a drug on food intake and weight reduction and he also promised them $15 for participating to be paid at the end of the testing. Therefore, for these two groups he introduced the bias which I have explained to you before. One must not provide that if one wants to have an objective assessment.

In the third group of 32 subjects he stated that he was giving this medication which was a nasal decongestant and to his surprise, when he did that, the [70] patients did not lose any weight and did not reduce their food intake. To my interpretation and assessment this is the only valid group because they did not know that they were supposed to have a weight loss.

Therefore, his conclusion that it was effective in reducing food intake I think is totally in error. The only objective assessment is in the group which did not know what they were getting and there, in fact, he found no effect. So my conclusions differ from his, and I think his are wrong.

118. Dr. Hoebel's second paper, "Body Weight Decreased In Humans By Phenylpropanolamine Taken Before Meals" (RX 2), reported the results of a double-blind, subject-crossover study also designed to investigate the effectiveness of phenylpropanolamine in

appetite suppression and weight control. A weight loss associated with phenylpropanolamine of a fraction of a pound per week during the 4-week period of the study was reported (RX 2, p. 203), and the paper concluded that "phenylpropanolamine was effective in producing a short-term weight loss in the population sampled" (RX 2, p. 206).

119. After analyzing this study Dr. Margen stated that the fractions of a pound of weight loss Dr. Hoebel reported to be associated with phenylpropanolamine may, in fact, have been the result of entirely different stimuli. Dr. Margen testified (Tr. 189–90): [71]

. . .if you look at the percent weight change in two weeks, in the case of the drug it is minus 1.2 percent and in the PPA a difference of 5 percent, and we know the body weight can vary without any treatment over two weeks by that amount.

But I want to point out that even more interesting, and I think this is really a very fascinating part, before the subjects entered the study they were weighed and then they entered the study and in both cases, in the PPA and in the placebo group, there was a significant weight loss in the few days before the study was undertaken, before anything was given. In fact, the weight loss in the patients who were then given the PPA was greater than the weight loss of the people given the placebo and, in fact, the weight loss in the few days in the group given the PPA was, as I calculated it here, about 1.3 pounds, which was as great as the change in over two weeks of the placebo week, so just in anticipation of the experiment the patients lost almost the same amount of weight. It had nothing to do with the administration of anything.

Dr. Margen also noted that, again, only the "means" were reported and no mention was made of the individual variability of test subjects. The potential effect of this omission was explained by Dr. Margen (Tr. 189): [72]

Now, what are the differences? First of all, Dr. Hoebel, if you look at the chart [RX 2, p. 203], the differences look as if they might be rather impressive. For instance, if you look at the PPA [phenylpropanolamine] versus the placebo on the first two weeks, it looks like the people on the PPA went down more than they did on the placebo and it is true they did go down more. The change in body weight during the first two weeks on the drug was minus 2 pounds, on the placebo minus 1.23 pounds, and we are not told the variability.

Now, one individual, mind you, in that group having, let's say, a weight loss of approximately 10 pounds could completely distort the entire group and tell you absolutely nothing and give you an entirely erroneous impression, so unless you have some idea of the variability or some idea of what the individual weight losses were in there, this is absolutely valueless.

In commenting on the study's reported weight losses, Dr. Margen testified (Tr. 191):

. . . [W]e don't have evidence from this paper that this weight loss was even

statistically significant and certainly, from a clinical point of view, this is totally insignificant.

120. Dr. Drenick likewise questioned whether Dr. Hoebel's test results were valid or had medical significance. He testified (Tr. 385–86): [73]

To decide whether or not it [phenylpropanolamine] is effective one has to answer the question whether or not it has a significant effect from a medical point of view or is significant from the point of view of the patient who wants to lose weight. And, in fact, if one analyzes this article more closely, one can see that the greatest weight loss, regardless of whether any drug or placebo was given, occurred before either of these items was administered. The patients lost either 2-1/2—no, 1-1/2 or 1 pound of weight before they received any kind of treatment. Then, over a two-week period the patients who were given the drug lost less than 2 pounds or less than 1-1/2 pounds.

The difference between the phenylpropanolamine treated group and the placebo treated group, the difference in weight loss was less than 1 pound. If you want to express this in a per cent weight change and the difference between the two groups it is 1/2 of 1 per cent difference in weight change.

* * * * * * *

When you, however, ask yourself does a difference of less than one pound between treatment groups mean anything to the patient or to a physician, the answer would be obviously not. This much of a difference would not be noticeable in anyone who is significantly overweight.

[74] Of basic importance, moreover, Dr. Drenick pointed out that Dr. Hoebel had no reason to believe the fraction of a pound a week weight loss he attributed to ingestion of a tablet containing phenylpropanolamine would continue, and that Dr. Hoebel himself recognized this (Tr. 386) when he wrote (RX 2, p. 206):

One should also be aware that our evidence for a statistically significant weight loss in a two-week period does not mean that this rate of loss would be continued over longer periods. Drug tolerance and a myriad of other physiological and social factors could affect longer term results.

121. Neither of Dr. Hoebel's studies constitutes a reasonable basis for the representations of weight losses held out to the public in respondents' advertisements. Weight losses of a fraction of a pound a week do not support or substantiate advertising of respondents conveying the net impression that prospective purchasers and users of the X-11 tablets would lose large poundages of "ugly fat" amounting to virtually any amount, "5, 10, 25 or more pounds," "83 lbs.," "80 lbs.," "40 lbs.," etc. For the obese or overweight, weight losses of a fraction of a pound a week were clinically trivial and insignificant. Further, as already pointed out, Dr. Hoebel himself concluded that a weight loss in a two-week period did not mean that

this rate of loss would be continued over a longer period because of drug tolerance and other factors (RX 2, p. 206).

122. Little of the evidence introduced in this proceeding related to methylcellulose, the second ingredient in X-11 tablets which allegedly is conducive to weight loss. Methylcellulose, as noted, is a "bulk producer," a non-digestible but harmless bulky material [75] no more effective for the treatment of obesity than the "high-residue, low-calorie diet itself" (CX 92, p. 9). "Bulk producers of the methylcellulose family have no proved anorectic effect" (CX 115). Tests by Dr. Drenick, established that within minutes after ingestion of one-half to one gram of methylcellulose, (which is twenty to forty times the 25 mg in an X-11 tablet), the methylcellulose had passed out of the stomach well into the small intestines with no effect on the appetite (CX 115; Dr. Drenick, Tr. 367).

3. *The X-11 tablet does not contain any "unique" ingredient*

123. Respondents have admitted that phenylpropanolamine is the allegedly "unique" ingredient which they identified or alluded to in their X-11 advertisements (Ans. P&D, ¶9, p. 10; Supp. Adm. P&D, No. 41). They also concede that phenylpropanolamine is not unique to X-11 tablets (Motion to Dismiss, p. 84), but contend that the representation made by them was that phenylpropanolamine is a "unique" pharmacological substance. Respondents' advertisements, however, have the capacity to convey the net impression to members of the public reading them the representation that X-11 tablets were the only preparation available without prescription containing phenylpropanolamine. This conclusion is reinforced by the frequent use of terms such as "Now . . . LABORATORY SCIENCE HAS PERFECTED A TINY TABLET" (CX 8, 14 and 15), "RECENTLY, Laboratory Science has perfected. . ." (CX 46-47 and 49), "Here, at last. . ." (CX 19), which convey the impression that scientific research has developed a new, heretofore unknown, aid to those seeking to lose weight.

124. As hitherto made clear, phenylpropanolamine "is a member of the sympathomimetic amine family," a group of agents related pharmacologically and in their chemical structure (Supp. Adm. P&D, No. 35; CX 92, pp. 5-6; RX 1 and 2; Dr. Prout, Tr. 676). Although there are [76] quantitiative differences, phenylpropanolamine being a weak member of this group, all these amphetamine-like drugs produce the same types of responses, *i.e.*, central stimulant effects, wakefulness and increased mental and physical activity (CX 92, p. 6; RX 14, p. 1; Sorer, Tr. 622). Phenylpropanolamine being considerably less potent than amphetamine, its parent

compound (Dr. Prout, Tr. 708), has fewer side effects than other members of the amphetamine family. Because it produces less central nervous stimulation and is the only drug of this class available without prescription, phenylpropanolamine was described as "unique" (Palmer, Tr. 562; Hoebel, Tr. 1201-02). However, considering the representation of "uniqueness" in respondents' advertisements, it is unlikely that the public would interpret this representation to mean only that phenylpropanolamine is unique with reference to other sympathomimetic amines or other pharmacological substances. On the contrary, the representation that respondents' advertisements had the capacity to convey is that, when compared to other dietary aids available without prescription, X-11 tablets contain a totally different or "unique" chemical, in other words, that phenylpropanolamine is unique to X-11 tablets. Since phenylpropanolamine is in many over-the-counter preparations (Dr. Sorer, Tr. 641-42; Supp. Adm. P&D, Nos. 42 and 43; Adm. P&S, No. 42), this representation is false. Respondents have therefore misrepresented in their advertisements that X-11 tablets contain a unique ingredient.

RESPONDENTS' FAILURE TO DISCLOSE MATERIAL FACTS IN ADVERTISING X-11 TABLETS

1. *Respondents failed to disclose that testimonials reciting weight losses of great magnitude did not reflect the typical or ordinary experience of x-11 users*

125. Respondents' advertisements contain a number of testimonials reciting great weight losses achieved by users of X-11 tablets. For example, in CX 19, as [77] discussed in earlier findings, Mrs. George Stowe, Canon, Georgia, is quoted "I USED TO WEIGH 160 LBS. NOW I'M DOWN TO 105", Mrs. Ken Schmidt, Norfolk, Nebraska, is pictured stating "I LOST OVER 40 LBS., TOO," and Mrs. Beverly Tellier, Chula Vista, California, likewise is shown stating "I LOST OVER 40 LBS." In another ad Mrs. Ken Schmidt is quoted "I LOST 80 LBS!" (CX 18). The record is replete with similar testimonials (see, *e.g.*, CX 1, 2, 15, 22, 24, 44, 49 and 68).

126. Through the use of such testimonials respondents represented that the results obtained by those giving testimonials reflected the typical or ordinary experience of persons purchasing and using X-11 tablets. In the testimonials the least amount of weight loss claimed is 40 pounds (CX 19), and the claims range as high as 83 pounds (CX 68). Multiple testimonials were often used in the same advertisement adding to the implication that it is typical for users of

X-11 tablets to experience weight losses of such magnitudes. Statements such as "FROM GEORGIA TO NEBRASKA TO CALIFORNIA American Women Have Found A Way That Really Helps Off THAT UGLY FAT" (CX 1 and 19) also reinforced the implication that the stated weight losses were typical for all users of X-11 tablets.

127. The weight losses cited in the testimonials in respondents' advertisements, however, are not representative of the typical or ordinary experience of purchasers and users of X-11 tablets. The tablets themselves produce no weight loss and medical experience establishes that even with a stringent dietary regime, and professional supervision, weight losses of the magnitudes portrayed by respondents' testimonials are highly unusual and extraordinary for overweight or obese individuals.

128. Dr. Prout testified that only one in twenty patients instructed in a weight-reducing regimen would achieve weight losses of twenty to thirty pounds within [78] a period of approximately twenty weeks (Tr. 717). Dr. Drenick testified that "[o]nly ten percent of obese individuals will ever lose more than 40 pounds in a single dietary regimen" (Tr. 412). In *Drugs of Choice* (CX 92), Drs. Modell and Reader stated that "most obese patients will not stay in treatment," and "of those who do, most will not lose weight" (CX 92, p. 2).

129. Based on the above statements, it is apparent that a weight loss of 40 to 83 pounds for an obese individual would be extremely rare. Respondents have failed to disclose to potential users of X-11 tablets the fact that, contrary to the results achieved by those whose testimonials are published, weight losses of great magnitude are not representative of the typical or ordinary experience of X-11 users.

2. *Respondents failed to disclose in their advertisements for X-11 tablets that persons with high blood pressure, heart disease, diabetes or thyroid disease should use X-11 tablets only under the direction of a physician*

130. Respondents Porter & Dietsch, William H. Fraser, Kelly Ketting Furth and Joseph Furth admitted that phenylpropanolamine, because of its pressor effect, should not be ingested by persons with high blood pressure, heart disease, diabetes or thyroid disease except under the advice and supervision of a physician (Adm. P&D, No. 59). The package insert accompanying X-11 tablets contains an FDA-required warning that persons with those diseases or conditions should use X-11 tablets only as directed by a physician (Adm. P&D, Nos. 60-61; Adm. P&S, Nos. 60-61). [79] The package containing X-11 tablets also has "CAUTION: Individuals with high blood pressure,

heart disease, diabetes or thyroid disease should use only as directed by a physician. . ." printed on the back (CX 36 and 39). Despite respondents' awareness that X-11 tablets should not be used by such members of the public, they made no mention of this fact in any of the X-11 advertisements.

131. Phenylpropanolamine is an active vasoconstrictor which tends to constrict blood vessels and thereby elevate blood pressure (CX 94; RX 5; Dr. Drenick, Tr. 369-70; Dr. Prout, Tr. 695). For a person already afflicted with high blood pressure, ingestion of phenylpropanolamine could elevate blood pressure to even higher, and possibly dangerous, levels (Dr. Margen, Tr. 238-39); Dr. Drenick, Tr. 417; Dr. Sorer, Tr. 627-28). According to Dr. Sorer, giving a product containing a sympathomimetic amine to an individual with high blood pressure "would be like dousing a fire with gasoline" (Tr. 627).

132. Phenylpropanolamine can also be dangerous to a person with heart disease by putting an extra strain on his or her heart, with potentially serious consequences (Dr. Drenick, Tr. 417-18); Dr. Sorer, Tr. 629-30). Dr. Sorer testified (Tr. 629):

> We are talking about people with low cardiac reserve where an extra weight placed on the heart or its organism could prove fatal or adverse.

Such danger would be greater for a person on a nutritionally deficient diet such as that contained in the X-11 package, because this makes a person's nervous system even more susceptible to the irritant effects of phenylpropanolamine (Dr. Drenick, Tr. 417). [80]

133. Large numbers of the nation's public have high blood pressure or heart disease. Data of the National Center for Health Statistics of the U.S. Public Health Service, reported by the American Heart Association, show that, as of 1972, an estimated 28,410,000 Americans have either high blood pressure or some form of heart disease. Of these, some 22,950,000 — or one of every six adults — have high blood pressure (CX 109, pp. 13, 29). Although half of the people with high blood pressure are not aware that they have this condition (CX 109, pp. 13, 29), an admonition in advertisements against use of X-11 tablets by individuals with high blood pressure or heart disease would serve to notify a large number of potential purchasers that they should not use, or purchase, X-11 tablets.

134. For persons with diabetes, phenylpropanolamine carries the risk of elevating the blood glucose level, thus aggravating a situation already potentially hazardous. Dr. Sorer testified (Tr. 630):

> On pharmacological grounds, again these agents do elevate blood glucose. Diabetics

have already elevated blood glucose very simplistically so this could again make a potentially bad situation worse. It is possible.

135. According to the official Report of the National Commission on Diabetes, dated December 1975, diabetes is increasing by 6 percent each year, and now affects one out of every 20 Americans (CX 108, p. 1). Dr. Prout, whose expertise includes diabetes treatment, feels that these figures are conservative and that the true rates of increase are even higher (Tr. 701–02). Dr. Fineberg characterizes the increase in diabetes as "exploding" (Tr. 1360–61). The likelihood of being diabetic doubles with every decade of life, and more than doubles with every 20 percent of excess weight (CX 108, pp. 2, 47; Dr. Prout, Tr. 703), and 70 to 85 percent of all adult diabetics are over-weight [81] (CX 108, p. 15; Dr. Prout, Tr. 703). These figures establish the need for a warning in respondents' advertisements against use of X–11 tablets by a substantial portion of the purchasing public who should not ingest any product containing phenylpropanolamine.

136. High blood pressure, heart disease and diabetes occur more frequently and with greater severity among the obese and overweight than in the population generally (Adm. P&D, No. 53; Dr. Prout, Tr. 702; Dr. Margen, Tr. 151).

137. Persons with overactive thyroid also subject themselves to increased health hazards by ingesting phenylpropanolamine. Dr. Drenick testified (Tr. 418):

Q. If a person with thyroid disease took X–11 tablets together with the instructions [sic] for their use, would that result in a danger for that person?

A. If the thyroid were overactive, I think it would. . . .

Q. Should . . . persons with . . . thyroid disease use such a preparation as X–11 only as directed by a physician?

A. Yes.

138. First-time purchasers of X–11 tablets through the mails plainly have no way of knowing, and obviously are unaware at the time of purchase, of the warning on the package of X–11 tablets. (Adm. P&D, No. 62; Adm. P&S, No. 62). Also, the public may rely [82] entirely on the affirmative representations in respondents' advertisements and fail to notice the limitation as to use printed on the back of the X–11 package prior to purchase.

139. The potentially hazardous consequences to the health of overweight or obese persons who have high blood pressure, heart disease, diabetes or thyroid disease from ingestion of X–11 tablets,

are material facts of the greatest importance, and plainly had the capacity to affect the consideration by such persons of whether or not to purchase respondents' tablets.

3. *Respondents failed to disclose in advertising that a highly restricted caloric diet is an integral adjunct to the use of X-11 tablets*

140. As is clear from what has already been said, for users of X-11 tablets to lose weight, a "diet" must be followed and caloric intake must be restricted (Dr. Drenick, Tr. 350; Carretta, Tr. 661). The package of X-11 tablets, as noted, contains instructions and a diet providing for a drastic reduction of caloric intake (CX 37, 40 and 133), and expert testimony described this as a "starvation" or "semi-starvation" diet (Dr. Margen, Tr. 169; Dr. Drenick, Tr. 406; Dr. Fineberg, Tr. 1330). Respondents' advertisements, however, failed to disclose that, in conjunction with the use of X-11 tablets, a severely restricted diet had to be followed. On the contrary, the public was told that they could continue to "EAT" and "EAT WELL" while losing "ugly fat." Failure to disclose that a highly restricted, low-caloric diet had to be followed for purchasers and users of X-11 tablets to lose weight constituted a failure to disclose a material fact likely to affect the decision of members of the public whether or not to purchase X-11 tablets. [83]

RESPONSIBILITY OF WILLIAM H. FRASER FOR DECEPTIVE ADVERTISING OF X-11 TABLETS

141. As stated at the beginning of this decision, individual respondent William H. Fraser is the president and sole owner of Porter & Dietsch (Fraser, Tr. 753-54). Admittedly, he formulates, directs and controls the acts and practices of Porter & Dietsch (Ans. P&D, ¶1).

142. Mr. Fraser's responsibility for the deceptive advertising of X-11 tablets does not, however, derive solely from his role as the chief executive officer and owner of respondent Porter & Dietsch. He was an active participant in the formulation and dissemination of the advertising here in issue. Although stating he relied entirely on Mr. Gettleman for the X-11 tablet advertising content (Tr. 798 and 878-80), Mr. Fraser, in fact, originated the use of testimonials (Furth, Tr. 962-63), and made other contributions to the advertising content (Furth, Tr. 977-78). He discussed X-11 advertising with Mr. Furth, who subsequently met with Mr. Gettleman to complete the ad copy (Fraser, Tr. 797; Furth, Tr. 959). Mr. Fraser, furthermore, had

the power to reject advertisement ideas developed by Mr. Furth and Mr. Gettleman (Fraser, Tr. 798). When advertisements were completed in final form, Mr. Fraser handled their preparation for dissemination (Fraser, Tr. 796), and thereafter placed them directly or sent authorizations to retailers for ad placement (Fraser, Tr. 795 and 799). Mr. Fraser is responsible for the X-11 advertisements as chief executive officer and sole owner of Porter & Dietsch, and as an active participant in their creation and dissemination.

RESPONSIBILITY OF KELLY KETTING FURTH AND JOSEPH FURTH FOR DECEPTIVE ADVERTISING OF X-11 TABLETS

143. Respondent advertising agency Kelly Ketting Furth and individual respondent Joseph Furth played an active role in the misleading and deceptive advertisements [84] disseminated by respondents Porter & Dietsch and William H. Fraser. Mr. Furth began work on the advertising of X-11 tablets for Porter & Dietsch in June 1968, two or three weeks before the formation of Kelly Ketting Furth (Furth, Tr. 928-35; CX 83). After Kelly Ketting Furth commenced business, Mr. Furth summarizes the firm's role as the advertising agency for Porter & Dietsch as follows (Tr. 927):

> An advertising agency functions with an advertiser in the liaison preparation of, development of, placing of advertising.

Joseph Furth was the account executive in Kelly Ketting Furth responsible for the Porter & Dietsch account, and prepared advertising copy for products marketed by Porter & Dietsch (Ans. P&D, ¶4). His function as account executive was ". . . to handle it in a normal way in which an advertising agency might handle the advertising for an advertising client" (Tr. 937). During the time he has been Kelly Ketting Furth's account executive for Porter & Dietsch, Joseph Furth has implemented and prepared all advertising copy for the X-11 tablets (Fraser, Tr. 794-98; Furth, Tr. 944-46; Adm. P&D, No. 10 b and 3).

144. In addition to implementing and preparing advertising copy, Mr. Furth originated the theme which pervaded respondents' X-11 advertising in one form or another: "Eat Well and Lose [That] Fat." Mr. Furth testified that his suggestion to Mr. Gettleman developed into this advertising concept and was used in the "first original conventional newspaper advertisement" (Tr. 981-82). This slogan appeared in an X-11 advertisement as early as 1969 (CX 87). Mr. Furth and Mr. Gettleman worked together in creating and developing subsequent X-11 advertising (Tr. 951 and 956). [85]

145. Kelly Ketting Furth and Mr. Furth put the ideas and

suggestions of Mr. Gettleman into finished advertisements, establishing emphasis, headlines and layout (Tr. 940–41, 958–61 and 964–65). In short, they played an active role. A letter to Mr. Fraser from Kelly Ketting Furth by Mr. Furth, vice-president, dated September 13, 1968, reads (CX 151): "Enclosed is suggested copy and layout for ad you requested for newspaper weeklies." On November 1, 1968, Mr. Furth wrote to Mr. Fraser (CX 152):

About two months ago, on your request, I prepared a 35-line ad on X-11, and sent it to you.

* * * * * * *

This could be an effective way to get a steady bleed on Free Standing Stuffer markets.

Again on December 4, 1968, Mr. Furth wrote to Mr. Fraser (CX 153):

I am enclosing layout for a revised format for the Free Standing Stuffer.

I believe that it has a "nicer feel," yet retains the power of the previous insert.

On the Imprint side we have used a more meaningful illustration of a slim doll, who appears to be anticipating the food she has ordered. It graphically gets over the point, "Eat what you want and slim down." [86]

On this side, I would like to use the copy we used previously.

We have reversed the panel on the flap from red to blue — and I think it looks stronger.

On the back side I wanted to retain the "power" of our previous insert, but have changed the headline to that of our 16" dealer ad which seems to be perking. Here, I would intermix copy from the dealer ad with some of the copy now in the stuffer. I would like to keep the copy as is in the pink panel.

We have made provision for the weight chart in the lower panel.

What do you think? Should we switch over perhaps in February?

146. Mr. Furth kept Mr. Fraser up to date on X-11 advertising developments (CX 154–55). In a letter of January 28, 1971, Kelly Ketting Furth and Mr. Furth advised Mr. Fraser of Mr. Gettleman's "approval on copy" for an X-11 advertisement, Mr. Furth stating that he would work Mr. Gettleman's idea in "as follows" providing Mr. Fraser with proposed copy (CX 156). In another letter dated July 14, 1971, Mr. Furth wrote Mr. Fraser "I am returning the Odrinex copy, and copy I have prepared patterned on the small ad all type format" (CX 157). "Odrinex" is a "diet pill" competing with X-11 tablets (CX 157, p. 3). In letters of August 29 and December 4, 1972, Mr. Furth made suggestions to Porter & Dietsch relating to the

testimonials in the X-11 advertisements of Mrs. Stowe, Mrs. Tellier and Mrs. Schmidt, and the layout of other features (CX 159 and 160). On June 18, 1973, Mr. Furth sent Mr. Fraser a "second 2-column newspaper ad" noting that it was [87] "virtually resized from the page Roto ad which ran over Drug Guild's name in the New York News and did so splendidly," and that "it basically is our original ad, done a little differently, and the ad that Thompson 'swiped' for Appedrine" (CX 162). The advertisement featured "Eat Well. . .And Lose That Fat" picturing an X-11 tablet and a silhouette of a slim lady (CX 162, p. 2). On July 13, 1973, Mr. Furth sent Mr. Fraser an X-11 advertisement cast in the "Standard [R]oto size" suitable for the "Minneapolis Sunday Roto" (CX 163). This advertisement contained handwritten revisions on the Kelly Ketting Furth letterhead. On October 31, 1973, Mr. Furth wrote Mr. Fraser (CX 165):

> You've asked for "new" ads. I've been holding out for the old.
>
> Here is a compromise that has some new elements the competition is not yet using.
>
> First, Appedrine and now Odrinex have adopted our silhouette figure. I don't want to drop ours. But I have added a reduced "pot-bellied" man to indicate how much "gut" he has taken off. This may give us the man-and-woman appeal, which the others aren't using.

(See also CX 166 through CX 173).

147. On March 14, 1974, Mr. Furth advised Porter & Dietsch against a suggestion for affixing "a pressure sensitive sticker on the X-11 package stating 'Does not contain amphetamines' ", a proposal advanced to counter newspaper publicity linking Hodgkin's disease with the use of diet pills containing "amphetamines or related drugs" (CX 168). He commented to Mr. Fraser that the idea "should be viewed cautiously" because phenylpropanolamine "is a 'cousin' related structurally and pharmacologically" to amphetamine, and that since [88] "[w]e are dealing with 'Label' as differentiated from advertising. . .we would be a 'sucker' for possible FDA misbranding, hence seizure" (CX 168).

148. Kelly Ketting Furth and Joseph Furth handled the placing of Porter & Dietsch's X-11 advertising in publications throughout the country (Stipulations, Tr. 378-83; Fraser, Tr. 881; and Furth, Tr. 942-43). Advertisements in media which recognize "national" advertisers as a rate class, such as *TV Guide,* were placed for Porter & Dietsch by Kelly Ketting Furth by forwarding them directly to the publication. Kelly Ketting Furth was then billed for such space (Furth, Tr. 942-43; Stipulation, Tr. 381-83). "National" advertising

accounted for about half of all advertising of X-11 tablets (Fraser, Tr. 868).

149(a). Kelly Ketting Furth, and individual respondent Joseph Furth, played an active role in the creation and dissemination of Porter & Dietsch's advertising for X-11 tablets, and knew or should have known that the representations contained in such advertising were false, misleading and deceptive. That this is true is not only revealed by the facts set out in the foregoing findings, but is dramatically shown by the letter from Mr. Furth to Mr. Fraser (CX 164), quoted earlier in this decision, in which he answered Mr. Fraser's criticism that an advertisement for the X-11 tablets lacked "punch." Mr. Furth displayed his keen knowledge of the X-11 tablet advertising, both content and strategy, and his active role in creating and disseminating it, by commenting to Mr. Fraser on the dangers of "put[ting] emphasis on the tablets" in making weight loss claims—"That's murder, because the pills will not reduce weight an iota" (CX 164). Mr. Furth continued in his letter warning Mr. Fraser against putting in the advertisements for X-11 tablets the same kind of "punch" used in the competing "diet" pill advertising of Appedrine, Hungrex and Odrinex, [89] noting frankly that he was afraid "we're all going to get into hot water because of Appedrine, Hungrex and Odrinex" (CX 164, p. 2).

RESPONSIBILITY OF PAY'N SAVE CORPORATION FOR THE DECEPTIVE ADVERTISING OF X-11 TABLETS

149(b). Pursuant to arrangements with Porter & Dietsch, many advertisements for X-11 tablets were placed for publication by officials of Pay'n Save Corporation over the Pay'n Save corporate name. Pay'n Save lent its name, prestige and corporate identity to the advertisements for X-11 tablets, and the claims and representations made for them in such advertisements thus became those of Pay'n Save Corporation.

150. The working arrangement between Porter & Dietsch and Pay'n Save Corporation originated around 1969 or 1970. A representative of Porter & Dietsch persuaded the manager of the Everett, Washington, store of Pay'n Save to put in a stock of X-11 tablets and to run an advertisement (Palmer, Tr. 507-08; Affidavit of Calvin Hendricks attached to Motion to Dismiss of Pay'n Save dated November 28, and filed December 1, 1975). The promotion was successful and the Pay'n Save buying committee decided to advertise X-11 tablets throughout the Seattle area. Thereafter, Pay'n Save drug stores generally carried and advertised the X-11 tablets (Tr. 508-13). The criteria used by the Pay'n Save buying committee in

deciding to carry and advertise X-11 tablets, according to Pay'n Save's pharmacy supervisor, was that (Palmer, Tr. 513): [90]

> They [Everett Pay'n Save store] had sold a hundred-plus units of product in a three-day ad, which is considered very good return on a brand new item, and so, based on this, they [the buying committee] were looking for something that might be successful in all stores. If we could sell a hundred of everything brand new the first time we advertised it, we would be very happy.

The decision of the buying committee was based entirely on the successful sales generated in the Everett store, and the claims and representations contained in the advertisements to which Pay'n Save lent its name were not scrutinized (Palmer, Tr. 510–14).

151. Under the arrangement between Pay'n Save and Porter & Dietsch, the dates and media in which X-11 advertisements were published were selected by Porter & Dietsch, and insertion orders were sent by that respondent to Pay'n Save. The latter paid the publication for carrying the advertisements and was later reimbursed for between 75 and 90 percent of the cost by Porter & Dietsch upon transmittal of a tear sheet. In such instances, the X-11 tablets were advertised, and all the claims and representations described and set out in earlier findings, were made over the name of Pay'n Save Corporation (see Stipulations Tr. 115–17, 377–80, 428–35; Affidavit of Calvin Hendricks, *supra;* RX 8 through 13; Palmer, Tr. 518–26). Readers and prospective purchasers were told that the X-11 tablets were available at all Pay'n Save stores. A coupon was also attached to many of the advertisements for prospective purchasers to fill out and mail to Pay'n Save Corporation to receive a supply of X-11 tablets by mail (CX 1–2, 14–20, 29, 31–33, and 35). In other words, respondent Pay'n Save Corporation advertised the X-11 tablets as if the tablets were its own product. [91]

152. Wherever advertisements for X-11 tablets appeared over the Pay'n Save corporate name, it was with the approval and by the direction of Pay'n Save (Tr. 525). At all times, Pay'n Save Corporation had the option of accepting or rejecting the X-11 advertisements submitted to it by Porter & Dietsch (Fraser, Tr. 807). However, as indicated, such advertisements were neither analyzed nor evaluated by Pay'n Save prior to its decision to publish them (Palmer, Tr. 510–14).

153. Porter & Dietsch was never contacted by Pay'n Save Corporation for material substantiating the claims and representations for the X-11 tablets made in the advertisements, nor to determine if Porter & Dietsch had such material, and Pay'n Save had no information whatever as to whether there was any reasonable basis for such claims and representations (Palmer, Tr.

547-50, 471-72). Nor did Pay'n Save officials, or its pharmacy supervisor, make any inquiry of their own. In sum, Pay'n Save depended totally upon Porter & Dietsch, as follows (Tr. 547):

> I think we were depending totally upon the manufacturer to present a product that had been sold and advertised to other people for a number of years and that upon that basis we felt that apparently the product did have merit.

Pay'n Save Corporation thus published advertisements over its own name making affirmative claims and representations to the public for the X-11 tablets without knowing whether or not those claims and representations were true or false, without having made any inquiry to determine whether they were true or false, and without knowing or having made any inquiry to determine whether there was even a reasonable basis for such claims and representations. [92]

154. Under the circumstances, Pay'n Save Corporation is, and must be, responsible for the deceptive representations made to the public. Pay'n Save is not relieved from such responsibility because the content and copy of the advertisements were prepared and created by the other respondents in this proceeding.

III

Basic Considerations

1. Tablets

Respondents Porter & Dietsch, William H. Fraser, Kelly Ketting Furth and Joseph Furth place great emphasis upon the contention that they advertised and marketed a "plan," not tablets and therefore made no representations as to the X-11 tablets alone. As the findings disclose, this argument is unsubstantiated by the facts and is rejected. An examination of respondents' many advertisements, in the opinion of the law judge, demonstrates beyond question that respondents were promoting and selling X-11 diet tablets, and that the representations made to the public in respondents' advertisements related to the efficacy of the tablets and the results to be achieved from their use.

Labeling the box of tablets the "X-11 Reducing Plan," coupled with the liberal use in advertising copy of the word "plan," does not and cannot change the realities of respondents' product. Repeated use of the word "plan" in the advertisements and on the box of X-11 tablets was, in the view of the law judge, a transparent attempt to avoid what respondents accurately perceived to be dangers in [93] making significant, large weight reducing claims of virtually any amount for the tablets. As reiterated herein, Porter & Dietsch's

advertising account executive, individual respondent Joseph Furth, revealed the true reason for respondents' effort to transform the advertising and sale of X-11 tablets into the promotion of a reducing "plan" (CX 164):

> Appedrine and Hungrex (even Odrinex) put emphasis on the tablets. That's murder, because the pills will not reduce weight an iota.
>
> It is the "Plan" that will keep us out of hot water.

The genesis of respondents' claim to be marketing a "plan" undoubtedly lies in *Carlay Co.* v. *Federal Trade Commission*, 153 F.2d 493 (7th Cir. 1946), where a Commission order against a candy product presented as a reducing aid was overturned, and the court accepted the argument that a "plan" was involved. But *Carlay* does not decide the factual issue of what respondents were, and are, marketing in this proceeding.

The Commission has had occasion in recent years to deal with cases where contentions were made that a "plan" rather than an individual product was being advertised and sold.

In *Stauffer Laboratories, Inc.*, 64 F.T.C. 629 (1964), a "Magic Couch" was marketed as part of a home reducing "plan" to "lose unwanted pounds." Respondents in that proceeding contended that their couch was sold only as an "inextricable integral [94] component" of the Stauffer "plan," and that it was erroneous to construe representations in their advertising as applicable only to the "Magic Couch." Many of the advertising claims in *Stauffer* resemble those of respondents here. (See 64 F.T.C. at 646.) The Commission concluded that, notwithstanding repeated references to "plan," claims were made for the "Magic Couch" independent of the "plan." The Commission concluded (64 F.T.C. at 648):

> We fail to see merit in respondents' urging that a "plan" is involved. As stated above, the device was represented as being effective of itself, and the challenge is made to that claim. Moreover, the "plan" is in reality nothing more than the device served with a little garnish of advice and handholding.

On appeal, *Stauffer Laboratories, Inc.* v. *Federal Trade Commission*, 343 F.2d 75 (9th Cir. 1965), respondent *Stauffer* relied on the *Carlay* case and charged the Commission with error in finding that members of the public were misled into believing that claims made for the "plan" related solely to the couch. *Stauffer* argued to the Court of Appeals that (343 F.2d at 78):

> . . .Petitioner advertises and sells a "Stauffer Home Plan," a "Stauffer Home Reducing Plan," a "Figure-Beautifying Plan," and a "Stauffer Principle" of "sensible"

weight reduction and muscle toning. All of these terms are constantly used in Petitioner's advertising and booklets.

[95] The Ninth Circuit rejected this argument and affirmed the Commission's decision, without even citing *Carlay,* noting that in working out its selling program *Stauffer* undertook to tie the couch in with a "plan" consisting of a diet and couch, because the device was the money making part of the operation whereas (343 F.2d at 78):

> Low calorie diets can be readily procured in small, inexpensive booklets or pamphlets; they can be procured without charge or for a nominal sum from the Government Printing Office, and they may be found in almost any ladies' magazine.

In the present proceeding respondents' claim to be promoting a "plan" is likewise grounded on the insertion in the box of X-11 tablets of a single-page leaflet containing a low-calorie diet (CX 37 and 40).

In *Damar Products, Inc.,* 59 F.T.C. 1263 (1961), respondents marketed a "Salon Vibrator Plan" for helping "to achieve the slimmer figure you have often admired." The Commission adopted the then hearing examiner's decision finding that respondents' advertisements had the effect of causing members of the public to believe that the claims of "body-weight reduction" related to the "vibrator" alone even though the *Damar* advertisements referred to a "plan." The Court of Appeals affirmed. *Damar Products, Inc.* v. *Federal Trade Commission,* 309 F.2d 323 (3rd Cir. 1962).

As it was in the foregoing cases, so it is here. Respondents' use of "plan" in marketing their diet tablets was simply a "gimmick" used in an effort to escape liability for deceptive claims and representations for X-11 tablets. [96]

2. *Representation that users could lose weight without dieting*

Respondents contend that their advertising did not represent that users of X-11 tablets could lose weight without restriction of their caloric intake stating that the ads "speak loudly" that the X-11 tablets will "control your appetite," "counteract hunger," and further contain language such as "you eat less, want less." Respondents, however, ignore the predominant theme of the X-11 advertisements.

Respondents' advertisements, as described in the findings, are replete with emphatic statements and bold-type representations implying that no dieting was required, that users of X-11 tablets could "EAT WELL . . . AND LOSE THAT FAT," "WITHOUT EVER MISSING A

MEAL," could "ENJOY FOODS [THEY] CHOOSE," that users could "SATISFY [THEIR] APPETITE" "WITHOUT EVER GOING HUNGRY," that users could lose weight without "STICKING TO BORING REDUCING DIETS," without "STARVATION DIETING HUNGER," without "HUMDRUM METHODS SO MANY WOMEN HAVE TRIED AND GIVEN UP IN DESPAIR," and many other like promises and representations. The net impression conveyed to the public by respondents' advertisements is what counts. *Charles of the Ritz* v. *Federal Trade Commission,* 143 F.2d 676, 679 (2nd Cir. 1944); *U.S. Retail Credit Ass'n, Inc.* v. *Federal Trade Commission,* 300 F.2d 212, 219 (4th Cir. 1962); *J. B. Williams Co. Inc.,* v. *Federal Trade Commission,* 381 F.2d 884, 889–90 (6th Cir. 1967). Advertisements are to be judged by their effect on the average member of the public who will be influenced by the impression gleaned from a quick glance at the most legible words. *Ward Laboratories, Inc.* v. *Federal Trade Commission,* 276 F.2d 952, 954 (2nd Cir. 1960), *cert. denied,* 364 U.S. 827; see also, Commission decisions of November 26, 1974, in *Standard Oil of California,* CCH Trade Reg. Rep., ¶20,789, page 20,655, and in *Crown Central Petroleum Corp.,* CCH Trade Reg. Rep. ¶26,790, page 20,669. The net impression of [97] respondents' advertisements, as previous findings set out, is that users of X–11 tablets could lose "ugly fat" "without restricting their accustomed caloric intake—in short, without dieting."

3. *Representation of reasonable basis for advertising that substantially all users of X–11 tablets would lose a significant amount of weight*

Respondents insist that even if they are held to have marketed and made representations about tablets rather than a reducing "plan," they did not represent to the public that *substantially all* users of X–11 tablets would lose a significant amount of weight. Respondents' advertisements were directed to the public at large, particularly to the overweight and obese. They held out and represented to the public that significant, large amounts of body weight of virtually any amount, could and would be lost by anyone who purchased and used the X–11 tablets. Such representation was not made to any limited portion of the public, but to every reader of X–11 advertisements. The advertisements contained no limitations, but told all readers "YOU" are offered "a way to get rid of unsightly, superfluous fat you're carrying," a way "to lose 5, 10, 25 or more pounds of unsightly fat," and the like. Results were guaranteed to every reader or "money back." Considering respondents' advertisements in their entirety, such advertisements had the capacity and tendency to lead

members of the public to believe that respondents had a reasonable basis from which to conclude that substantially all X-11 users would lose virtually any amount of weight desired. See *National Dynamics Corp.*, 82 F.T.C. 488, 564 (1973), *aff'd* but remanded as to Paragraphs 1 and 2 of the order, *National Dynamics* v. *Federal Trade Commission*, 492 F.2d 1333 (2nd Cir. 1974), *cert. denied*, 419 U.S. 993. [98]

4. *Failure to have a reasonable basis for representations of a significant weight loss*

Respondents did not have a reasonable basis for their representations of weight loss, either when X-11 tablets were first put on the market and advertised in 1967, during subsequent years, or as a result of more recent studies by respondents' experts, Drs. Silverman and Hoebel.

In support of their claim that they had a reasonable basis for their representations of weight loss respondents rely on the *Alleghany Pharmacal* proceeding, 75 F.T.C. 990 (1969). The evidence in that proceeding most favorable to respondents, however, only supports the proposition that a preponderance of the evidence did not establish that phenylpropanolamine was without "significant pharmacological value as an appetite suppressant or weight reducing agent."

There is, in fact, substantial evidence in this record that phenylpropanolamine is ineffective as an appetite suppressant in the 25 mg dosage contained in each X-11 tablet. But whatever the truth may be in this respect, neither the evidence here nor in *Alleghany Pharmacal* establishes that respondents had a reasonable basis for representing that 25 mg of phenylpropanolamine ingested one-half hour before each meal will bring about the significant, large weight losses of virtually any amount held out to the public in respondents' advertising. As the Commission remarked in *Crown Central Petroleum, supra*, CCH Trade Reg. Rep. at page 20,665:

> respondents' advertising claims greatly exceed even the most favorable interpretation of [the] evidence.

[99] And as the Commission said in *National Dynamics, supra*, 82 F.T.C. at 549:

> A performance claim is not a technique which can be used with impunity for ascribing specific attributes to a product based on nothing more than a guess that it will perform as represented.

In the opinion of the law judge, before respondents could lawfully

hold out to the public in their advertising that users of X–11 tablets would lose virtually any amount of weight—83 lbs., 80 lbs., 55 lbs., 40 lbs., "5, 10, 25 or more" lbs.—respondents were obligated to have available adequate and well-controlled scientific studies or tests providing a valid scientific or medical basis for such claims. The Commission made clear in *Pfizer, Inc.*, 81 F.T.C. 23 (1972), that the type of substantiation required to satisfy the reasonable basis standard would depend on the facts of each case. In this proceeding, respondents were advertising a drug to be taken internally for the treatment of overweight and obesity, which conditions pose serious and real dangers to the health. Under such circumstances, the foregoing standard of substantiation was required. Respondents did not, and do not now, have such substantiation. Indeed, respondents did not even meet a lesser standard. Neither medical literature, clinical experience, nor general medical knowledge provided in 1967, when X–11 tablets were first placed on the market, or now provide, a reasonable basis for the representations of weight loss in respondents' advertising.

5. *Advertising X–11 tablets as containing a unique ingredient was deceptive*

Respondents contend that X–11 tablets contain a "unique" ingredient because phenylpropanolamine differs from other pharmacological substances, and because [100] phenylpropanolamine is the only member of the phenethylamine family sold without a prescription. Respondents' advertisements, however, do not convey this limited meaning for "unique" to the public. It has long been established that in evaluating advertising claims, a technical interpretation of each phrase is not the standard applied to determine deceptiveness. Rather, evaluation of the over-all impression advertisements are likely to make on the buying public determines whether or not such advertisements are deceptive. *Murray Space Shoe Corp.* v. *Federal Trade Commission*, 304 F.2d 270, 272 (2nd Cir. 1962). Purchasers of X–11 tablets could reasonably have concluded that the "unique" claims in respondents' advertisements meant that X–11 tablets were the only dietary aid available over the counter containing phenylpropanolamine.

In finding that respondents' advertising of a "unique" ingredient is deceptive, it is not necessary that a conscious intent to deceive be shown. *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67, 79 (1934); *Koch* v. *Federal Trade Commission*, 206 F.2d 311, 317 (6th Cir. 1953); *Ford Motor Company* v. *Federal Trade Commission*, 120 F. 2d 175, 181 (6th Cir. 1941); *Gimbel Bros., Inc.* v. *Federal Trade*

Commission, 116 F.2d 578 (2nd Cir. 1941). Even if respondents intended to convey only the limited meaning which they now ascribe to "unique," where an advertising claim has dual or multiple meanings, one of which is false, such advertisements are misleading. *Giant Food Inc.* v. *Federal Trade Commission,* 322 F.2d 977, 981 (D.C. Cir. 1963); *cert. dismissed,* 376 U.S. 967 (1964); *Rhodes Pharmacal Co., Inc.* v. *Federal Trade Commission,* 208 F.2d 382, 387 (7th Cir. 1954), *rev'd* in part reinstating Commission decision, 348 U.S. 940 (1955). [101]

6. *Testimonials were deceptive*

Respondents assert that testimonials included in their advertisements were not deceptive since these testimonials "relate specifically to the 'plan' and do not relate to the tablets at all" (Motion to Dismiss, p. 89). The contention relating to the "plan" has been discussed in detail and rejected. It is worth noting again, nevertheless, that as their original letters disclose (CX 147–49), persons whose testimonials were used looked upon respondents' product as tablets, not a "plan." In publishing the testimonials, the endorsements of "tablets" or "diet pills" in the original letters from X–11 users were changed to refer to the "X–11 Plan" or "X–11 Reducing Plan."

When an advertisement contains a testimonial reflecting the experience of an individual with a product, there is an implicit representation that such experience reflects the typical or ordinary results anyone may anticipate from use of the product. *National Dynamics Corp., supra* at 564. The weight losses publicized in testimonials in respondents' advertisements do not reflect the typical or ordinary experience of users of X–11 tablets, or the results overweight or obese persons can typically anticipate from their use. Following a low-calorie diet is very difficult, especially for the seriously obese and overweight and is seldom successful (see, for example, CX 92–93, 96 and Dr. Drenick, Tr. 406), although on occasion, of course, someone will persevere and lose a large amount of weight.

The argument of respondents' (Motion to Dismiss, p. 91) that a testimonial to a weight loss of 83 lbs. is only relevant to someone who is 83 lbs. or more overweight is fallacious. As complaint counsel correctly point out, someone who is 25 pounds overweight will reason that if X–11 tablets will cause a person 83 lbs. overweight to lose that amount of excess fat, they will surely be effective to cause a 25 pound weight loss. [102]

As previously discussed, X–11 tablets in and of themselves will not cause any weight loss. A stringent diet, faithfully followed over a

prolonged period, will undoubtedly result in weight loss. However, the testimonials do not reflect the typical or ordinary experience of X-11 users, and their use without noting this fact is deceptive.

7. *Failure of advertisements to contain a health warning*

Brief comment is appropriate with respect to Paragraph Twelve of the complaint. The record establishes that phenylpropanolamine is a "vasoconstrictor" which tends to constrict the blood vessels and to raise blood pressure. It should not be ingested by persons with high blood pressure, heart disease, diabetes or thyroid disease except as directed by a physician. Failure to disclose this in respondents' advertising for X-11 tablets constitutes a failure to disclose a material fact. The "Caution" on the box of X-11 tablets warning that persons with these conditions should use X-11 tablets only as directed by a physician does not, in the view of the law judge, render it proper and nondeceptive for the advertisements to omit such a "Caution."

Members of the public who have high blood pressure, heart disease, diabetes or thyroid disease, and such persons are very numerous, have a right to the warning before making a trip to a store to buy respondents' X-11 tablets.

Respondents also market their X-11 tablets by mail order. Many of their advertisements contained a coupon for the prospective purchaser to fill out and mail to a retail store, or to Porter & Dietsch, to obtain a supply of tablets (for example, CX 18, 19 and 49, reprinted herein). Mail order purchasers, obviously, will not know about the "Caution" on the [103] box until they receive their X-11 tablets. The law is violated if the first contact with a prospective purchaser is deceptive. *Carter Products, Inc.* v. *Federal Trade Commission,* 186 F.2d 821, 824 (7th Cir. 1951); *Montgomery Ward & Co., Inc.* v. *Federal Trade Commission,* 379 F.2d 666 (7th Cir. 1967).

Nor does the fact that large numbers of the public do not know they have high blood pressure, heart disease, diabetes or thyroid disease render, as respondents urge, a warning in the advertisements "meaningless" (see Motion to Dismiss, p. 87). Significant numbers of the public with high blood pressure, heart disease, diabetes or thyroid disease do know of their condition, and a warning in X-11 advertisements would serve to dissuade them from using X-11 tablets without the guidance of a physician. It is significant that a disproportionate number of individuals with these conditions are overweight or obese and, absent such warning, a greater percent than that in the population at large would be attracted by respondents' advertisements. Additionally, a warning in the adver-

tisements might well cause prospective purchasers of X–11 tablets who have the proscribed conditions, but who are ignorant of that fact, to check with a doctor before purchasing the tablets.

8. *Failure of advertisements to disclose that a highly restricted diet was integral to the X–11 "Plan"*

Paragraph Thirteen of the complaint alleges that respondents did not disclose in their advertising that a "highly restricted caloric diet was an integral part" of respondents' X–11 Reducing Plan. Examination of respondents' advertisements fully supports this allegation. Not only was there no disclosure that users of the X–11 tablets would have to follow a diet providing for a drastically reduced food intake to achieve significant weight losses, but the complete contrary [104] was represented. As has been described, and as the advertisements reprinted reveal, respondents affirmatively told the public that large poundages of body fat could be lost without "sticking to boring reducing diets," without "starvation dieting hunger," etc. Failure of respondents' X–11 advertisements to disclose that users were required to follow a low-calorie diet constituted a failure to disclose a material fact "likely to affect [the public's] consideration of whether or not to purchase said product."

9. *Collateral estoppel, stare decisis and res judicata*

As noted, respondents Porter & Dietsch, William H. Fraser, Kelly Ketting Furth and Joseph Furth filed amended answers pleading an affirmative defense that the "Commission is precluded from bringing this proceeding . . . under principles of collateral estoppel and/or stare decisis." Respondent Pay'n Save Corporation likewise filed an amended answer raising these affirmative defenses, and added "res judicata."

The basis for these defenses is the contention that the Commission and the Postal Service have already litigated the issue or issues in this proceeding, and have resolved them in favor of respondents. The cases respondents refer to are *Alleghany Pharmacal, supra,* and *Hanover House* and *Romar Sales, supra,* (see Appendix to Motion to Dismiss, p. 60).

The doctrines of res judicata and collateral estoppel are applicable to bar a second suit based on the same cause of action, or to bar relitigation of an issue or issues previously litigated. *Lawlor* v. *National Screen Service,* 349 U.S. 322, 326 (1955). The issues in *Alleghany Pharmacal, Hanover House* and *Romar* are not the same as the issues in this proceeding. [105]

The issue in this proceeding *inter alia* is whether X-11 tablets, containing phenylpropanolamine, will bring about the significant, large weight losses of virtually any amount held out to the public in respondents' advertising, not whether, for example, phenylpropanolamine has any significant pharmacological value as an appetite suppressant or weight-reducing agent. See *Alleghany Pharmacal,* 75 F.T.C. 996-97, *Hanover House* and *Romar Sales,* (Appendix in Support of Motion to Dismiss, pp. 6-7).

Where the issues are different, even if similar the Commission plainly cannot be estopped. *J. C. Martin Corp.* decision of the Commission of July 6, 1964, CCH Trade Reg. Rep., 1963-65 Transfer Binder, ¶16, 976, p. 22,054, *aff'd, J. C. Martin Corp.* v. *Federal Trade Commission,* 346 F.2d 147, 148 (3rd Cir. 1965), *Federal Trade Commission* v. *Raladam Co.,* 316 U.S. 149 (1942).

With respect to the defense of "stare decisis," that doctrine applies to principles of law, not to matters of fact. There were no principles of law enumerated in *Alleghany Pharmacal,* or in *Hanover House* and *Romar Sales,* binding on the Commission in this matter. Those proceedings do not preclude the Commission from litigating this matter.

10. *Responsibility of William H. Fraser*

As prior findings disclose, the responsibility of individual respondent William H. Fraser is clear, and it is essential that he be covered by the order in his individual capacity. *Standard Educators, Inc.,* 79 F.T.C. 858, 892-99 (1971), *aff'd, Standard Educators, Inc.* v. *Federal Trade Commission,* 475 F.2d 401 (D.C. Cir. 1973), *cert. denied,* 414 U.S. 828 (1973); *Coran Bros. Corp.,* 72 F.T.C. 1, 24-25 (1967); *Fred Meyer, Inc.* v. *Federal Trade Commission,* 359 F.2d 351, 367-68 (9th Cir. 1966), modified on another point, 390 U.S. 341 (1968). [106]

11. *Responsibility of Kelly Ketting Furth and Joseph Furth*

There is no warrant for relieving either Kelly Ketting Furth or Joseph Furth of responsibility for the deceptive advertising of X-11 tablets. Both were active participants in the preparation and dissemination of the advertisements, and knew or should have known of the deceptions involved. *Carter Products, Inc.* v. *Federal Trade Commission,* 323 F.2d 523, 533-34 (5th Cir. 1963); *Doherty, Clifford, Steers & Shenfield, Inc.* v. *Federal Trade Commission,* 392 F.2d 921, 928 (6th Cir. 1968); *ITT Continental Baking Co., Inc.,* CCH Trade Reg. Rep. ¶20,464, pages 20,383-85 (Order of October 19, 1973),

modified and aff'd *ITT Continental Baking Co.* v. *Federal Trade Commission,* 532 F.2d 207 (2nd Cir. 1976).

12. *Responsibility of Pay'n Save*

There is no dispute that Pay'n Save Corporation did not originate any of the claims or representations disseminated to the public in the advertisements for X-11 tablets. In the opinion of the law judge, however, this fact does not relieve Pay'n Save of responsibility. As the findings describe, Pay'n Save either received the mats or other materials from Porter & Dietsch and placed these advertisements in various media, or the advertising material was sent directly to the news media and held by them until Pay'n Save authorized publication. The fact is, however, that major newspaper advertisements were published over Pay'n Save's corporate name which made claims and representations to the public for X-11 tablets which were false, misleading and deceptive.

It would be unreasonable to permit Pay'n Save now to avoid responsibility for disseminating deceptive advertising on the ground that Porter & Dietsch furnished the advertisements. Such an outcome would [107] allow Pay'n Save to disseminate false advertising over its name with impunity, so long as it obtained the advertisements from a supplier. There is no foundation for such a position in reason or logic and, in the view of the undersigned it is contrary to the public interest.

Holding Pay'n Save responsible for false, misleading and deceptive representations disseminated over its own corporate name is not unfair, and does not place an unreasonable burden on Pay'n Save. In the case of supplier furnished advertisements Pay'n Save, or any other retail chain similarly situated, may simply elect not to publish the advertisements if it does not know whether or not the claims and representations contained in them are true. Nothing compelled Pay'n Save to publish the Porter & Dietsch advertisements here involved, and nothing in this ruling requires Pay'n Save to "maintain a staff of scientists and lawyers" to screen such advertisements. However, since Pay'n Save determined to publish advertisements furnished by Porter & Dietsch, and in effect to disseminate the claims and representations therein as its own, it must, in the view of the undersigned, as any other advertiser, assume responsibility for the claims and representations communicated to the public.

There is nothing extraordinary in imposing such a standard upon Pay'n Save. The rationale of *Pfizer, Inc., supra,* applies to any firm making claims and representations for products to the public. As the

Commission remarked over 15 years ago in the case of an advertising agency, the argument of Pay'n Save "is merely another variation of the oft-repeated effort to avoid responsibility for a violation of a statute by shifting it to another." *Colgate-Palmolive Co.*, 59 F.T.C. 1452, 1471 (1961), final order aff'd, *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965). Nothing in this ruling prevents Pay'n Save from advertising suppliers' products for [108] resale. The ruling is only that, where Pay'n Save elects to publish advertisements making affirmative claims and representations for products, Pay'n Save assumes responsibility for the truthfulness of the claims and representations made.

MOTION TO DISMISS

The motion to dismiss filed by respondents (except Pay'n Save Corporation) on March 29, 1976, is hereby denied in accordance with what has been said in this initial decision.

IV

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over the corporate and individual respondents in this proceeding, and over their acts and practices in the advertising, promotion, marketing and sale of X-11 tablets.

2. The X-11 tablets, contained in packages marked "X-11 Reducing Plan," are "drugs" within the meaning and intent of Section 15(c) of the Federal Trade Commission Act.

3. Respondents have disseminated unfair, false, misleading and deceptive advertisements, statements and representations in the promotion, marketing and sale of X-11 tablets, and respondents' advertisements constitute "false advertisements" as that term is defined in the Federal Trade Commission Act.

4. The dissemination by respondents of unfair, false, misleading and deceptive advertisements, statements and representations in the promotion, marketing and sale of X-11 tablets has had, and now [109] has, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that such advertisements, statements and representations were, and are, true and free of material omissions, and into the purchase of substantial quantities of X-11 tablets by reason of such erroneous and mistaken belief.

5. The dissemination by respondents of unfair and false, misleading and deceptive advertisements, statements and representations in the promotion, marketing and sale of X-11 tablets, were, and are, to

the prejudice and injury of the public, and of respondents' competitors, and constituted, and now constitute, unfair and deceptive acts and practices in or affecting commerce, and unfair methods of competition in or affecting commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act.

6. This proceeding is in the public interest.

V

Remedy

Brief comment respecting the order should be made. Broad product coverage with respect to respondents Porter & Dietsch and William H. Fraser is essential to ensure that violations similiar to those reflected in this record do not occur in the future. *Federal Trade Commission* v. *Ruberoid,* 343 U.S. 470, 473 (1952); *Federal Trade Commission* v. *National Lead,* 352 U.S. 419, 428–30 (1957). The authority of the Commission to issue an order extending to all products to prevent future violations is well established. *Consumer Sales Corp.* v. *Federal Trade Commission,* 198 F.2d 404 (2nd Cir. 1952); *Niresk Industries, Inc.* v. *Federal Trade Commission,* 278 F.2d 337, 342–343 (7th Cir. 1960), rehearing denied June 8, 1960, *cert. denied,* 364 U.S. 883. *Carter Products, Inc.* v. *Federal Trade Commission,* [110] 323 F.2d 523, 532–33 (5th Cir. 1963); *Western Radio Corp.* v. *Federal Trade Commission,* 339 F.2d 937, 940 (7th Cir. 1964), *cert. denied,* 381 U.S. 938; *Benrus Watch Company* v. *Federal Trade Commission,* 352 F.2d 313, 324 (8th Cir. 1965), *cert. denied,* 384 U.S. 939 (1966); *Firestone Tire & Rubber Company,* 481 F.2d 246 (6th Cir. 1973). Where required the order applicable to the foregoing respondents extends to "X–11 tablets or any other product." Where inappropriate the provisions have been narrowed.

As stated earlier, where human health is at stake, and other factors of a serious nature to the public are involved, *Pfizer, Inc., supra,* 81 F.T.C. at 64, respondents must, in the opinion of the undersigned, have adequate, well-controlled scientific tests to support product claims and representations disseminated. Further, to prevent evasion of this standard, and to make certain that claims and representations disseminated requiring support by adequate, well-controlled scientific tests are in truth so supported, the order requires respondents, prior to disseminating such claims and representations, to have submitted such tests to the Commission for acceptance as fully substantiating the claims and representations being made.

Respondents, however, are not limited with respect to those who

may conduct such tests, inasmuch as it is the nature and validity of the tests which is important, not who conducts them.

A provision has also been inserted requiring disclosure of the details and circumstances associated with a result publicized in a testimonial. As shown herein, testimonials were disseminated by respondents in which women were quoted as having lost significant, large amounts of body weight, for example, 40 lbs., 80 lbs. For advertisements to be fully truthful, the [111] full facts and circumstances surrounding such weight losses should be disclosed. The public should be told whether such women adhered to drastic low-calorie diets while using respondents' X-11 tablets, or engaged in strenuous reducing exercises, how long it took to achieve the weight loss, and the like. Such are material facts relevant to product claims and representations for diet or reducing pills.

Further, in the view of the undersigned, respondents must be prevented from representing that body weight may be lost through the use of X-11 tablets, or any similar preparation, without disclosing the amount of such weight loss attributable to the X-11 tablets, or similar preparation, which is substantiated by adequate, well-controlled scientific tests. If tests substantiate only a weight loss of a fraction of a pound a week, attributable to X-11 tablets or similar preparation, for a few weeks before drug tolerance or other factors end such weekly loss, it would be misleading to hold out to the public a generalized claim without disclosing that it amounted to only a fraction of a pound per week, and was limited in duration.

Finally, the order prohibits respondents from attempting to mislead or misleading the public that a reducing "plan," "regimen," or "program" is being offered when in reality respondents are simply marketing pills or tablets.

VI

ORDER

It is ordered, That respondents Porter & Dietsch, Inc., a corporation, its successors and assigns, and its officers, and William H. Fraser, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other [112] device, in connection with the advertising, offering for sale, sale or distribution of X-11 tablets, or of any other preparation of similar composition or of similar properties, or dietary aid containing phenylpropanolamine, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease

and desist from representing orally, in writing, or in any manner, directly or by implication, that users of X-11 tablets, or of any of the foregoing preparations, products or aids, can lose weight without restricting their accustomed caloric intake and while they continue to eat the foods of their choice (or words of similar import or meaning).

It is further ordered, That respondents Porter & Dietsch, Inc., a corporation, its successors and assigns, and its officers, and William H. Fraser, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of X-11 tablets, or any other product potentially affecting human health or safety, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing orally, in writing, or in any manner, directly or by implication, that X-11 tablets, or any other product potentially affecting human health or safety, will be effective in producing any type of result, unless at the time such representation is made:

1. The representation is fully substantiated by adequate, well-controlled scientific tests accepted as such by the Federal Trade Commission,

2. the results, and methodology of such tests, together with with original data collected, [113] have been furnished to the Federal Trade Commission as documents available for public inspection,

3. copies of a brief but comprehensive written summary of the test results and methodology, in terms which are understandable to the average member of the public and which disclose the nearest place or places at which the complete test results, data and methodology may be inspected, are available to the public by mail upon request, and

4. any advertisement in which the representation is made shall clearly and conspicuously disclose that such summary may be obtained by mail upon request, and shall include the address to which such requests should be directed.

It is further ordered, That respondents Porter & Dietsch, Inc., a corporation, its successors and assigns, and its officers, and William H. Fraser, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of X-11 tablets, or any other product, in or affecting commerce, as

"commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from: [114]

1. Using any testimonial for X-11 tablets or any other product which reports a result unless the testimonial or a related disclosure in close conjunction therewith reveals clearly and conspicuously the typical or ordinary experience of members of the public with such product.

2. Using any testimonial for X-11 tablets or any other product which reports a result unless the testimonial or a related disclosure in close conjunction therewith reveals clearly and conspicuously the full details and circumstances associated with the result.

3. Representing orally, in writing, or in any manner, directly or by implication, that X-11 tablets or any other product contain one or more unique ingredients or components, unless respondents can establish that said ingredient(s) or component(s) are unique to such product.

It is further ordered, That respondents Porter & Dietsch, Inc., a corporation, its successors and assigns, and its officers, and William H. Fraser, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device in connection with the advertising, offering for sale, sale or distribution of X-11 tablets, or of any other preparation of similar composition or of similar properties, or dietary aid containing phenylpropanolamine, or any other dietary aid or purported weight-reducing product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from: [115]

1. Representing orally, in writing, or in any manner, directly or by implication, that users of X-11 tablets, or of any of the foregoing preparations, products or aids, will lose body weight without disclosing clearly and conspicuously the amount of such weight loss, on a per-week basis, attributable to X-11 tablets, or to any of the foregoing preparations, products, or aids, which is supported by adequate, well-controlled scientific tests.

2. Attempting to mislead or misleading the public that a "plan," "regimen" or "program" is being offered when in truth respondents are simply marketing X-11 tablets, or one of the foregoing preparations, products or aids.

It is further ordered, That respondents Porter & Dietsch, Inc., a corporation, it successors and assigns, and its officers, and William H. Fraser, individually and as an officer of said corporation and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, do

forthwith cease and desist from disseminating or causing to be disseminated by United States mail or by any means in or having an effect upon commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement for X-11 tablets, or for any preparation of similar properties, or for any dietary aid containing phenylpropanolamine, unless respondents clearly and conspicuously disclose the following statements, as applicable, with nothing to the contrary or in mitigation thereof:

This product requires users to "diet," that is, to restrict their caloric intake. Users cannot lose weight without restricting their accustomed caloric intake. [116]

It has not been established that this product is effective in promoting any significant or lasting weight loss.

WARNING: This product can cause a temporary increase in blood pressure. Persons with high blood pressure, heart disease, diabetes or thyroid disease should use this product only as directed by a physician. Overweight individuals are more likely to have such conditions than other persons, and often do not know it. See your doctor before taking this product.

It is further ordered, That respondents Pay'n Save Corporation and Kelly Ketting Furth, Inc., corporations, their successors and assigns, and their officers, and Joseph Furth, individually and as an officer of Kelly Ketting Furth, Inc., and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of X-11 tablets, or any other diet aid or purported weight-reducing food, drug or device, as "food," "drug," and "device" are defined in the Federal Trade Commission Act, do forthwith cease and desist from disseminating or causing to be disseminated by United States mail or by any means in or having an effect upon commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains a representation or testimonial for such product prohibited by this order, or which omits a disclosure for such product required by this order. [117]

It is further ordered, That all respondents forthwith deliver a copy of this order to each operating division and subsidiary, to all present and future personnel of respondents engaged in the preparation, creation or placing of advertising of foods, drugs or devices on behalf of respondents, and to all present and future agencies engaged in the preparation, creation or placing of such advertising for respondents,

and that respondents secure from each such person and agency a signed statement acknowledging receipt of said order.

It is further ordered, That respondents immediately recall and retrieve, from all persons and entities that have engaged in the advertising or promotion of X-11 tablets within the past two years, all advertising mats and promotional material which contain a representation or testimonial prohibited by this order or which omit a disclosure required by this order. Respondents Porter & Dietsch, Inc., and William H. Fraser shall also deliver written notice of the requirements of this order to all distributors and retailers of products marketed by said respondents, and shall institute a program of continuing surveillance adequate to reveal whether they are complying with said requirements including the above recall provision. In the event that nonconformity with any such requirements is discovered, said respondents shall immediately cease supplying all products to said distributors or retailers until adequate, reliable assurance of conformity is obtained.

It is further ordered, That all respondents shall maintain complete business records relative to the manner and form of their compliance with this order. Respondents shall retain each such record for at least three years, and shall retain substantiation and other documentation at least two years beyond the last dissemination of any representation or testimonial contingent thereon under the provisions of this order. [118] Upon reasonable notice, respondents shall make any and all such records available for inspection and photocopying by authorized representatives of the Federal Trade Commission at respondents' place of business or other properly designated location. For respondents Porter & Dietsch, Inc., and William H. Fraser, such records shall include (but not be limited to) all advertising, sales memoranda, policy directives, the basis for all applicable advertising claims, correspondence with persons who place advertising, and other pertinent documents.

It is further ordered, That all respondents herein notify the Commission at least thirty (30) days prior to any proposed change in a corporate respondent, such as dissolution, assignment or sale resulting in the emergence of any successor corporation or corporations, the creation or dissolution of subsidiaries, or any other change in said corporations which may affect compliance obligations arising out of this order.

It is further ordered, That each individual respondent named herein for a period of five (5) years from the effective date of this order promptly notify the Commission of the discontinuance of his present business or employment and/or of his affiliation with a new

business or employment. If applicable each such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which he is newly engaged as well as a description of his duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order. [119]

It is further ordered, That the respondents herein shall, within sixty (60) days after service of this order, file with the Commission a written report setting forth in detail the manner and form of their compliance with this order.

OPINION OF THE COMMISSION

BY COLLIER, *Commissioner:*

This proceeding challenges the lawfulness of advertising claims made for "X-11" tablets, a non-prescription drug sold as a weight reduction product.[1] In their appeal from the [2] Administrative Law Judge's ("ALJ's") proposed findings, conclusions, and recommended order, respondents[2] make numerous assertions of error on a broad range of factual [3] and legal issues. Contesting the initial decision page by page, respondents object to the ALJ's treatment of the meaning of the advertisements, the falsity of the claims, procedural

[1] The complaint invoked Sections 5 and 12 of the Federal Trade Commission Act. In pertinent part, Section 5 prohibits "unfair or deceptive acts or practices" and Section 12 prohibits the dissemination of "false advertisements" of food, drug, (medical) device and cosmetic products. "False advertisements" are those that are "misleading in a material respect," in light of (among other things)

> not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in light of such representations, or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in such advertisement or under such conditions as are customary and usual. [§15, 15 U.S.C. 55 (1914)]

[2] The respondents in this proceeding are Porter & Dietsch, Inc., which packages X-11 tablets and sells them through the mail and through retail drug stores (I.D. 1); Kelly Ketting Furth, Inc., an advertising agency, which works with Porter & Dietsch to prepare advertising for X-11 tablets (I.D. 4, 143-145); Pay'n Save Corporation, a chain of retail drug and sundry stores which sells X-11 tablets and disseminates X-11 advertising which has been prepared by Porter & Dietsch and Kelly Ketting Furth (I.D. 7, 149(b)-154); William H. Fraser, president and sole stockholder of Porter & Dietsch (I.D. 2, 141-142); and Joseph Furth, a vice-president of Kelly Ketting Furth, Inc., and an account executive for that concern in charge of Porter & Dietsch X-11 advertising (I.D. 5, 143-149(a)). The following abbreviations are used in this opinion:

I.D. — Initial Decision, Finding No.
I.D. p. — Initial Decision, Page No.
CX — Complaint Counsel's Exhibit No.
RX — Respondent's Exhibit No.
Tr. — Transcript of Testimony, Page No.
RB — Respondents' Appeal Brief to the Commission, Page No.
RRB — Respondents' Reply Brief to the Commission, Page No.

Respondent Pay'n Save has filed its own briefs in this appeal, while "adopting" the arguments of the other respondents as to the truth or falsity of the advertising in question. References to Pay'n Save's separate briefs will either be apparent in context or more specifically identified.

rulings, allegedly erroneous legal rulings, and the separate liability of certain respondents.

Meaning of the Advertisements

The complaint alleges, and the ALJ found, that respondents' advertisements represent:

— that users of X-11 tablets can lose weight without restricting their accustomed caloric intake and while they continue to eat the foods of their choice (Complaint, ¶ 9; I.D. 39);

— that respondents have a reasonable basis from which to conclude that substantially all users of X-11 tablets will lose a significant amount of weight (Complaint, ¶ 9; I.D. 47); and

— that the X-11 tablet contains a unique ingredient (Complaint, ¶ 9; I.D. 48).

I USED TO WEIGH 160 LBS.
NOW I'M DOWN TO 105
says Mrs. George Stowe
Canon, Georgia
I started on the X-11 Plan and started losing weight almost right away. I am so grateful to everyone I see. It's wonderful! I recommend the X-11 Plan.
LOST OVER 40 LBS.
...and LOST OVER 40 LBS. TOO
says Mrs. Ken Schmidt
Norfolk, Nebraska
Mrs. George Stowe says:
WAS
AM
FROM GEORGIA TO NEBRASKA TO CALIFORNIA
American Women Have Found A Way That Really Helps Rid THAT UGLY FAT
No Starvation Dieting - No Strenuous Exercise
RESULTS ARE GUARANTEED - OR MONEY BACK
EAT WELL ...and lose that Fat.
X-11
42 Tablets 3.00
105 Tablets 5.00
OR MAIL COUPON
PAY 'n SAVE
AVAILABLE AT ALL STORES

X-11 IS HERE!
eat well
...and lose that Fat!
—without ever missing a meal...
GET RID OF 5, 10, 25 or MORE POUNDS!
"I LOST 80 LBS!"
1 COUNTERACTS HUNGER
2 ACTS AS AN APPETITE APPEASER
3 FORTIFIED WITH VITAMINS
SATISFACTION GUARANTEED OR MONEY BACK
X-11
42 Tablets—$3.00
105 Tablets—$5.00
PAY 'n SAVE
AVAILABLE AT ALL STORES

Eat Well... and Lose That Fat!
AN EFFECTIVE PLAN TO LOSE UGLY FAT
NO EASIER REDUCING METHOD EVER DEVELOPED
X-11
42 TABLETS 2.98
105 TABLETS 4.98
SATISFACTION GUARANTEED OR MONEY BACK
Grand Central
FAMILY SAVINGS STORES

Advertising Supplement to Chicago Tribune Sunday, February 11, 1973 Section 9-A

EAT WELL...and Get Rid of 5, 10, 25 or More Pounds!

lose fat ugly fat

with This Amazingly Easy Reducing Plan!

Eat 3 Sensible Meals a Day — and SLIM DOWN!

■ Today, thousands of women throughout America are enjoying a revolutionary new way to diet that helps get rid of 5, 10, 25 or even more pounds and stabilize achieved weight at a level they've "dreamed of" holding as you follow this simple Plan.

■ Not by suffering thru starvation dieting hunger pangs. Not by sticking to boring reducing diets. Not by strenuous exercising. Not by any of the humdrum methods so many women have tried, and given up in despair.

■ Instead you EAT and LOSE WEIGHT! You can satisfy your appetite and remove pounds and inches at thighs, neck, legs, waistline . . . all over!

■ So, why carry around needless, excess weight when it is so simple to follow the X-11 Reducing Plan to trim it off.

■ Just take one of these specialized tablets ½ hour before your regular meals. Its unusual combination of ingredients helps give you the feeling of a fabulous meal . . . without fattening calories or fillingness. For "in-between meal" snacks, and provides a range of vitamins and minerals to help correct possible nutritional deficiencies.

MONEY BACK GUARANTEE

Enjoy eating the foods you choose while you lose weight! Superfluous fat can be the first to go on the basis of satisfaction — or your money back

GUARANTEED OR MONEY BACK

Don't miss out! Take advantage of this introductory offer. Get the amazing reducing dietary tablets after taking your first 14-day trial of the X-11 Reducing Plan and if not completely satisfied with the results you get, your money refunded without question when

42 TABLETS $3.00
105 TABLETS $5.00

If Your Drug or Department Store has run out of stock

FOR QUICK ACTION USE THIS COUPON TO ORDER BY MAIL

Fill out coupon below — place in envelope MAIL TODAY!

If your store is out of stock — fill out and mail this coupon for your

QUICK-BY-MAIL-SUPPLY

Just place this coupon in an envelope and enclose your remittance on guarantee of satisfaction — or money back. Your order will be shipped same day it is received.

GUARANTEE — You must be 100% delighted with results of your first package or your money will be refunded — no questions asked.

PLEASE PRINT YOUR NAME AND ADDRESS BELOW

Mail to: WALGREENS
Box 865
Berkeley, Ill 60163

My store is out of stock
Please rush supply checked below

☐ 42 tablets @ $3.00 ☐ 105 tablets @ $5.00

Name

Address

City State Zip

☐ Cash enclosed ☐ Money Order ☐ Check enclosed

Illinois residents, please add 5% sales tax.

[5] Although respondents do not contest that the advertisements are theirs, they deny that the ads conveyed any of these alleged claims.

We approach the task of reviewing the ALJ's findings on the meaning of the ads with utmost care. In particular, we are acutely aware that there is a strong public interest in avoiding constraints on truthful advertising. *See Bates* v. *Arizona*, 97 S. Ct. 2691 (1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); and *Bigelow* v. *Virginia*, 421 U.S. 809 (1975). In *Virginia State Board* the Supreme Court observed:

> [the] consumer's interest in the free flow of information of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate . . . So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well-informed. To this end, the free flow of commercial information is indispensable. 425 U.S. at 763–65.

The public interest in the free flow of truthful information makes the task of interpreting advertisements a delicate one. However, commercial speech is not entitled to the same unfettered constitutional protection afforded political speech. Deceptive commercial speech has no constitutional protection. *See Virginia State Board*, 425 U.S. n. 24 at 773–74 and *Bates*, 97 S. Ct. at 2708–09. Deceptive commercial speech does not aid consumers in making their purchasing decisions and may cause economic injury to those consumers who purchase the advertised product because of the deception. It also reduces the effectiveness of all advertising by casting doubt on its reliability. Therefore, although sensitive to the public interest in the free flow of commercial speech, we serve the same public goals when we meet our statutory obligations by prohibiting deceptive advertising. [6]

The ALJ applied common sense and expertise in setting forth the overall effects and net impressions that the advertisements conveyed,[3] and he supported his interpretations with references to the words used, the pictorial displays, and the layouts employed.

Respondents complain that use of these well-accepted techniques

[3] Such an approach is not merely permissible, but is required in order to assess whether advertising is "false" under Section 15 of the FTC Act, *supra* n. 1 at 1, and the Commission has long been upheld in reading advertising for its total or general impression on the consuming public. *See FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965) ("the finding of a Section 5 violation in this field rests . . . heavily on inference and pragmatic judgment"); *Murray Space Shoe Corp.* v. *FTC*, 304 F.2d 270, 272 (2d Cir. 1962); *Charles of the Ritz Distribs. Corp.* v. *FTC*, 143 F.2d 676 (2d Cir. 1944); *Exposition Press, Inc.*, v. *FTC*, 295 F. 2d 869, 872 (2d Cir. 1961), *cert. denied*, 370 U.S. 917 (1962).

for discerning the meaning of advertisements distorted them and wrenched various words and phrases from their context.[4] We have carefully reviewed each of these alleged examples of gerrymandering of the advertisements and we find that respondents' arguments are without merit. [7]

The Advertising and Sale of X-11 Tablets The ALJ found that respondents marketed "X-11 tablets"; respondents argue that they marketed the "X-11 Reducing Plan." The difference is significant, we are told, because the "plan" consisted of ingestion of the tablets plus adherence to a restricted diet. Respondents virtually concede that consumption of X-11 tablets alone, without dieting, will not produce any of the weight reduction results that the advertisements proclaim (RB 31; I.D. 53).[5] The tablets contain phenylpropanolamine hydrochloride ("PPA"); and respondents argue that PPA is an appetite suppressant that helps people stay on restricted diets. They contend, in short, that the tablets are part of the plan and not the plan itself.

Respondents emphasize the number of times that the word "plan" is used in the advertisements and the care with which the advertisements were designed to assure that express claims of weight loss were credited to the "plan." The ALJ considered that argument but chose instead to ascertain the net impression conveyed by the advertisements. His choice of approach was correct and we affirm his findings. [8]

Although the word "plan" was often used in the advertisements, it was not described as a rigorous program of reduced caloric intake. On the contrary, express claims for the plan stressed its capacity to allow consumers to "eat well," to avoid "starvation dieting hunger" and "boring reducing diets," and to have "3 sensible meals a day plus 'tween meal snacks."[6] These claims were coupled with and overshadowed by ubiquitous references to X-11 tablets which were described as the key to attaining these objectives.

Respondents also object to the ALJ's reference to consumer testimonials in Findings 19 and 20. These letters show that some consumers, even satisfied ones, perceived that respondents were selling tablets or pills rather than a plan. We reject the argument

[4] Respondents' zeal in pursuing this line of attack exceeds reasonable bounds when on several occasions they argue that the ALJ's findings display bias and prejudice (RB 35, 37, 55, 57).

[5] In addition, respondents' package insert candidly admonishes that "weight loss is only accomplished when a minimum of calories are consumed" (I.D. 52), and individual respondent Joseph Furth, the advertising account executive for Porter & Dietsch, cautioned the company to avoid emphasizing "tablets" in the advertising because "the pills will not reduce weight an iota. . . . [i]t is the 'Plan' that will keep us out of hot water" (CX 164).

[6] The diet which respondents assert was part of the "plan" was set forth in the package insert. In stark contrast to the advertising claims, the insert detailed an extremely strict program of dieting which the ALJ correctly found did not permit between meal snacks and did constitute a starvation or near starvation diet.

that this evidence is not probative and the further argument that customers' perceptions are not relevant to the allegation that respondents sold X-11 tablets. At the very least, the letters show that respondents' advertisements did not so indelibly implant [9] the "X-11 plan" in consumers' minds that they refrained from referring to the product as "tablets" or "pills."[7]

In a related sally, respondents attack a phrase in one of the several relevant findings (I.D. 12) that is not to be found in the advertising itself (RB 36). But the ALJ never found to the contrary and he made it clear that the words were his and not the advertiser's by the customary technique of placing quotation marks around some words and not others. Respondents create and then flog a strawman. The advertisement itself was made a part of the partially disputed finding and we conclude that the ALJ's interpretation of it was correct.

Claims of Weight Losses Without Dieting Based on a thorough review of the challenged advertisements, the ALJ found that respondents' advertising conveyed the impression that "users of X-11 tablets could lose body weight without dieting or consciously or materially changing their eating habits, . . . 'without restricting their accustomed caloric intake and while they continue to eat the foods of their choice.' " (I.D. 39) Respondents complain that this and other relevant findings (I.D. 28-38) rest on the erroneous repetition of selective excerpts from the advertisements. In adopting the contested findings, we note that the phrases which the ALJ highlighted were prominently featured in the advertising and formed the themes which the advertisements themselves constantly repeated. [10]

The ALJ's findings on this question are entirely consistent in our view with Commission experience in dealing with advertising claims for weight reduction products[8] [11] and with common sense. It is

[7] Another objection to the testimonial letters is based on a stipulation among the parties that consumer witnesses would not be called during the proceeding. Even if, by some stretch of the imagination, the stipulation were construed to cover documentary materials, respondents waived any objections on these grounds, first, by introducing similar letters of their own and, second, by failing to object to the introduction of complaint counsel's exhibits into evidence.

[8] *See, e.g., McGowan Laboratories, Inc.*, 11 F.T.C. 125 (1927); *Dispensary Supply Co.*, 20 F.T.C. 346 (1935); *Dispensary Supply Co.*, 22 F.T.C. 735 (1936); *Raladam Co.*, 24 F.T.C. 475 (1937), *aff'd* 316 U.S. 149 (1942); *Germania Tea Co.*, 25 F.T.C. 150 (1937); *Glenn Laboratories, Inc.*, 25 F.T.C. 302 (1937); *Wolf Drug Co.*, 25 F.T.C. 966 (1937); *Korjena Medicine Co.*, 26 F.T.C. 1013 (1938); *Helena Rubinstein, Inc.*, 27 F.T.C. 1 (1936); *Reliable Specialty Corp.*, 27 F.T.C. 627 (1938); *Gates Medicine Co., Inc.*, 27 F.T.C. 1040 (1938); *Isabella Laboratories*, 28 F.T.C. 38 (1939); *Alberty*, 29 F.T.C. 210 (1939), *aff'd as modified*, 118 F.2d 669 (9th Cir. 1941); *American Clinical Laboratories, Inc.*, 29 F.T.C. 1389 (1939); *Jean Ferrell, Inc.*, 30 F.T.C. 647 (1940); *Le Flor Co.*, 30 F.T.C. 1086 (1940); *Chapman Health Products Co.*, 30 F.T.C. 1199 (1940); *Sekov Corp.*, 31 F.T.C. 898 (1940); *Progressive Medical Co.*, 31 F.T.C. 1111 (1940); *Thyrole Products Co.*, 31 F.T.C. 1399 (1940); *American Medicinal Products, Inc.*, 32 F.T.C. 1376 (1941), *aff'd*, 136 F.2d 426 (9th Cir. 1943); *Miller Drug Co.*, 32 F.T.C. 122 (1940); *Burtley Co.*, 33 F.T.C. 455 (1941); *Clara Stanton, Druggist to Women*, 34 F.T.C. 153 (1941), *aff'd*, 131 F.2d 105 (10th Cir. 1942); *Bentley Co., Mail Order Division*, 34 F.T.C. 410 (1941); *Battle Creek Drugs, Inc.*, 34 F.T.C. 651 (1942); *Montgomery Ward & Co.*, 34 F.T.C. 1471 (1942); *Gene Hughes Drug*

(Continued)

obvious that dieting is the conventional method of losing weight. But it is equally obvious that many people who need or want to lose weight regard dieting as bitter medicine. To these corpulent consumers the promises of weight loss without dieting are the Siren's call, and advertising that heralds unrestrained consumption while muting the inevitable need for temperance if not abstinence simply does not pass muster. Where dieting is required, there is simply no substitute for clear and conspicuous disclosure that dieting is required.

Claims that Respondents Possessed Substantiation for Claims of Significant Weight Losses by Substantially All Users Respondents concede the "partial correctness"[9] of the ALJ's finding that the advertising represents that "substantially all users of X-11 tablets would lose a significant, in fact, as large an amount of weight as they desired" (I.D. 47; RB 39). They object, however, to that portion of Finding 47 which construes the advertising as containing affirmative representations that they possessed a reasonable basis for the "significant-weight-losses-by-substantially-all-users" claim (RB 39). Respondents complain that the ALJ "cites no language" in Finding 47 representing that they had a reasonable basis for such a claim. The ALJ properly drew his conclusion from the evidence reviewed in I.D. 40–46, on which Finding 47 rests.

As the ALJ found, (I.D. 40–47) the extravagance of the weight-loss claims implies that substantiation exists, and respondents have included statements in their advertising such as: "Laboratory Science has perfected a tiny pre-meal tablet . . ." (I.D. 44) (CX 1, 2, 11, 35, 46–48, 50, 52, 56, 58, 61–62 ["X-11 is the PROVEN and SOUND method . . ."], 74, 79); "clinic tested ingredients" (CX 47, 49, 74); and "The X-11 Reducing Plan is medically recognized as an effective plan to lose ugly fat." (CX 74)[10] *See also* I.D. 123. These statements not only implied the existence of substantiation but they also represented that this substantiation consisted of competent scientific proof. [12]

Stores, Inc., 35 F.T.C. 20 (1942); *Peggie Moran Co.*, 35 F.T.C. 27 (1942); *E. Griffiths Hughes, Inc.*, 40 F.T.C. 448 (1945); *Zo-Lon Co.*, 41 F.T.C. 38 (1945); *Langendorf United Bakeries, Inc.*, 43 F.T.C. 132 (1946); *Mid-West Drug Co., Inc.*, 43 F.T.C. 349 (1947); *Natural Foods Institute*, 50 F.T.C. 434 (1953); *Marlene's, Inc.*, 50 F.T.C. 460 (1953), *aff'd*, 216 F.2d 556 (7th Cir. 1954); *Renor Co., Inc.*, 53 F.T.C. 1222 (1957); *Rennel Products*, 54 F.T.C. 719 (1957); *Rennel Sales*, 54 F.T.C. 725 (1957); *Bakers Franchise Corp.*, 59 F.T.C. 70 (1961), *aff'd*, 302 F.2d 258 (3d Cir. 1962); *Damar Products, Inc.*, 59 F.T.C. 1263 (1961), *aff'd*, 309 F.2d 323 (3d Cir. 1962); *Consumer Laboratories, Inc.*, 61 F.T.C. 910 (1962); *National Bakers Services, Inc.*, 62 F.T.C. 1115 (1963), *aff'd*, 329 F.2d 365 (7th Cir. 1964); *Stauffer Laboratories, Inc.*, 64 F.T.C. 629 (1964), *aff'd* 343 F.2d 75 (9th Cir. 1965); *Farrar, Straus and Co., Inc.*, 65 F.T.C. 253 (1964); and *Simeon Management Corp.*, 87 F.T.C. 1184 (1976), *appeal pending*, No. 76-2543 (9th Cir.). We omit consent agreements and stipulations. Falsely advertised weight reduction products have run the gamut from food and drugs to devices and cosmetics.

[9] Respondents repeat their argument that they advertised the virtues of the "X-11 Reducing Plan" rather than "X-11 Tablets." See pages 7–8 above.

[10] We amend I.D. 44 to include the latter statements. *See* Appendix.

Moreover, it is now well-established that in the absence of a contrary disclosure, a product claim necessarily carries with it a representation that "the party making it possesses a reasonable basis for so doing, and that the assertion does not constitute mere surmise or wishful thinking on the advertiser's part." *National Commission on Egg Nutrition,* 88 F.T.C. 89, 191 (1976), *modified*——F.2d——(7th Cir. November 29, 1977). *See National Dynamics Corp.,* 82 F.T.C. 488 (1973), *modified,* 492 F.2d 1333 (2d Cir.) *cert. denied,* 419 U.S. 993 (1974); *Pfizer, Inc.,* 81 F.T.C. 23, 64 (1972).[11]

Respondents further argue that, by offering a "money back guarantee" (*e.g.,* CX 1), they qualified their claims and conveyed the message that X–11 would not cause substantially all users to lose a significant amount of weight. In our view, this argument stands common sense on its head. If anything, a money back quarantee reinforces in consumers' minds the sincerity of the advertisers' assertions, including those that are false and exaggerated.[12]

[13] *Unique Ingredient Claims* According to respondents, the ALJ "correctly found that which respondents admit - they advertised that their product contained a unique ingredient and that they intended phenylpropanolomine" [sic] (RB 40).[13]

The Falsity of the Claims

Because respondents have vigorously disputed the meaning that the ALJ ascribed to their advertisements, it is sometimes difficult to discern whether they also object to the findings that these claims were false.[14]

Claims of Weight Losses without Dieting Thus, the ALJ found, and we agree, that "[t]he representations of respondents in their

[11] In *Pfizer* we suggested that the failure to possess a reasonable basis is unfair within the meaning of Section 5. The complaint here alleged that the product claims were deceptive. Whether an advertisement is analyzed from the standpoint of deception or unfairness the result is the same and so is the standard for evaluating the substantiating material. *National Dynamics Corp., supra,* 82 F.T.C. at 550 n. 10.

[12] *See* I.D. 46; FTC Guides Against Deceptive Advertising of Guarantees, 16 C.F.R. 239.7; *All State Industries of North Carolina, Inc.,* 75 F.T.C. 465, 488–489 (1969), *aff'd,* 423 F.2d 423 (4th Cir.), *cert. denied,* 400 U.S. 828 (1970). In our view, *Jeffries* v. *Olesen,* 121 F. Supp. 463 (S.D. Calif. 1954); *Pinkus* v. *Walker,* 61 F. Supp. 610 (D. N.J. 1945) (injunction granted), 71 F. Supp. 993 (D. N.J. 1947) (final order, *sub nom. Pinkus* v. *Reilly*), *aff'd,* 170 F.2d 786 (3d Cir. 1948), *aff'd, sub nom. Reilly* v. *Pinkus,* 338 U.S. 269 (1949); and *Jarvis* v. *Shackelton Inhaler Co.,* 136 F.2d 116, 121 (6th Cir. 1943), are not to the contrary. These cases involved a statute unlike the FTC Act requiring proof of "actual intent to deceive" or "actual fraud in fact" and it was found that the money-back guarantee negated that intent. *See Pinkus* v. *Walker,* 61 F. Supp. at 613–14, and *Jeffries* v. *Olesen,* 121 F. Supp. at 473.

[13] We have some difficulty, however, fathoming the remainder of respondents' argument. They object to the ALJ's finding that the advertisements represented that X–11 *tablets* were unique. We are at a loss to discover how respondents' product could contain a unique ingredient (PPA) without X–11 tablets (which were admittedly the product containing PPA) being unique to the very same extent. It also escapes us how consumers could draw any other inference.

[14] For example, to support their argument that the ads are literally truthful, respondents assert that they recommended a "balanced diet." They go on to assert that one who has a balanced diet "eats well" (RB 39). The syllogism is interesting but misses the point. Respondents' advertising conveys more than the restricted meaning to which respondents must cling in their defense.

advertisements that users of X–11 tablets could lose weight without restricting their accustomed caloric intake, and while continuing to eat foods of their choice, were false, misleading and deceptive." (I.D. 54. *See* I.D. 50–53.) Respondents seem to concede as much when they argue that "it is impossible for the user of an appetite suppressant . . . to consume the foods of their [14] choice. . . ." (RB 40)[15] Neither do they deny that the advertising represents that consumers using X–11 can lose weight while continuing to eat foods of their choice; instead, they contend that the "choices" represented "can fairly be construed to relate to" the restricted diet which is inserted into each X–11 box (RB 31). In fact, as the ALJ found, weight losses require a highly restrictive "starvation or near-starvation" diet and total abstinence from such foods as gravies, nuts, candy, mayonnaise, pastries, whole milk, fried foods, rich dressings, and rich desserts.[16] These are often the very foods that overweight consumers hope least to abandon along with their unwanted inches.

Unique Ingredient Claims Respondents raise no objections to Findings 123 or 124, which conclude that the advertisements falsely claim that X–11 tablets contain a unique ingredient (RB 53).

Claims of Substantiation for the Significant Weight-Loss-by-Substantially-All-Users Claim The major controversy surrounding the alleged falsity of the advertisements centers on the charge that respondents implicitly promised, but did not possess a reasonable basis for the claim that substantially all users of X–11 tablets can lose significant amounts of weight. The primary question thereby put in issue by the complaint is not whether the claims of weight loss are false but instead whether, at the time they were made, respondents possessed reasonable substantiation for them. [15]

In the course of the hearing, the scope of this inquiry was expanded. Rather than scrutinizing only the material that respondents possessed and relied upon in making their claims (including the claims that they had such material), the parties produced numerous experts and documents bearing upon the pharmacological properties of PPA. The initial decision sifts this evidence in painstaking detail, and we affirm the numerous findings of the ALJ on these matters. At the same time, this evidence is of limited utility to the extent that it strays from the narrower issue of the type and

[15] The full text of respondents' argument is, "In Findings 50–54 the Law Judge does not address the issue of why it is impossible for the user of an appetite suppressant such as phenylpropanolomine, to consume the foods of their choice, while consuming less, thus losing weight consistent with the findings in *Carlay, supra* and *Alleghany, supra;* and the testimony of complaint counsel's witnesses, Drs. Margan and Drenick, Tr. 308, 452."

[16] In lieu of these foods, respondents' "eat-well," open "choice" diet consisted of such breakfasts as a half grapefruit and black coffee or a glass of orange juice and black coffee; such lunches as tuna chunks, celery and carrot sticks, and a slice of bread or string beans, beets and spinach and a slice of bread; or such dinners as broiled chicken, tossed salad and a fresh fruit cup, or baked fish, raw cabbage salad and a cup of soup (CX 40).

quality of the substantiation material possessed and relied upon by respondents at the time they made their claims.

The ALJ concluded that only "adequate and well-controlled scientific studies or tests" would provide adequate substantiation for claims made for a drug product like X–11, sold for the treatment of overweight and obesity, because these conditions pose dangers to health (I.D. p. 99). We see no need to reach the question whether consumers expect this type and quality of substantiation simply because the advertised product is a drug. In the context of this advertising, consumers were led to understand that respondents had competent scientific tests to substantiate their claims.

During the investigation of this matter and during the hearing, respondents conceded that they had no tests, studies, scientific reports or other similar information to support their implied claim that they had a reasonable basis for their weight-loss representations (I.D. 56–60).

Instead, respondents contend that they relied on a recommended decision of a Commission hearing examiner (which was never adopted as a final agency decision), *Alleghany Pharmacal Corp., et al.*, 75 F.T.C. 990 (1969), the decision in *Carlay Co.* v. *FTC*, 153 F.2d 493 (7th Cir. 1946), some materials on the general properties of methylcellulose,[17] [16] and copies of two 1957 letters from the Food and Drug Administration to other companies (RB 21, 41).[18] These materials, according to the record, were not reviewed by Porter & Dietsch, William H. Fraser, or Pay'n Save, although Joseph Furth was shown the *Alleghany* and *Carlay* decisions, but were in the possession of Mr. Frank Gettleman, an attorney for Porter & Dietsch. Mr. Gettleman supplied these materials during the investigation of this matter to the Commission's staff in response to their request for substantiation for X–11 advertising claims (I.D. 56–62).

In addition, respondents refer us to a decision of the United States Postal Service which was rendered after issuance of the complaint in this proceeding,[19] materials mentioned in *Alleghany*, and testimony and documents on the efficacy or degree of use of PPA introduced into evidence in this proceeding, including reports of studies concerning PPA which were also published after the complaint

[17] Respondents do not appeal the ALJ's finding that respondents had no reasonable substantiation as to the methylcellulose contained in X–11 and that methylcellulose itself does not suppress the appetite. (I.D. 122)

[18] Respondents object that the ALJ overlooked the FDA letters and the methylcellulose materials. Accordingly, we add an appropriate finding in the Appendix.

[19] In re Hanover House, P.S. Dkt. No. 2/143; and Romar Sales Corp., P.S. Dkt. No. 2/149 (Dec. ., 1975) (consolidated; not reported). The Postal Service decision found, at most, that expert opinion was divided on the efficacy of PPA and that the complainant had not carried its burden of proving that PPA is ineffective. Like the hearing examiner's recommended decision in the *Alleghany* case, there was no finding that "substantially all users [of PPA] will lose a significant amount of weight."

issued. As we have indicated, such evidence is irrelevant to the question whether the respondents have, as alleged in the complaint, misrepresented that they had substantiation for their advertising claims at the time that the claims were made. In any event, none of these materials supports the claim that "substantially all users of X–11 tablets will lose a significant amount of weight." [17]

Carlay involved a different product altogether, a candy which, when ingested before meals, presumably spoiled the consumer's appetite. The Commission found that the advertising was deceptive but the court held that the Commission's conclusion was not supported by substantial evidence.[20] Recognizing the factual dissimilarity between the candy in *Carlay* and their own X–11 tablets, respondents argue that the *Carlay* case gives them a license to make unlimited efficacy claims ("substantial weight losses") for any product that is an "effective" appetite suppressant sold in conjunction with a restrictive diet "plan" (revealed in full only in a package insert) (RB 42). Later cases render this alleged defense untenable. See *Stauffer Laboratories, Inc.* v. *FTC*, 343 F.2d 75 (9th Cir. 1965); *Damar Prods., Inc.* v. *FTC*, 309 F.2d 323 (3d Cir. 1962). Moreover, *Carlay* did not address the question whether substantial amounts of weight could be lost by eating candy before each meal. Even if PPA were an "effective" appetite suppressant in the dosages provided in X–11, it would not follow that "substantially all users of X–11 tablets will lose a significant amount of weight."

Alleghany involved a challenge to advertising claims for "Hungrex," a weight reduction product which also contained PPA. Respondents argue that the *Alleghany* case, or at least some of the evidence recited in the hearing examiner's recommended decision in that case, provides substantiation for the proposition that "substantially all users of X–11 tablets will lose a significant amount of weight." [18]

The hearing examiner in *Alleghany* concluded that the allegations of the Commission's revised complaint on reopening had not been established by a preponderance of the evidence, 75 F.T.C. at 1034. "[W]ithout expressing any opinion as to the accuracy of the findings and conclusions in the [hearing examiner's] Certification of Record," the Commission concluded that "it would not be in the public interest to pursue this matter further" and dismissed the complaint without prejudice, while leaving an earlier consent order against

[20] We reject the implication of respondents' argument that years after a court decision finding a failure of the government to establish the falsity of advertising claims, an advertiser can rely on the decision notwithstanding the present state of medical or scientific knowledge. We do not understand that to be the law, *see FTC* v. *Raladam Co.*, 316 U.S. 149, 150–151 (1942); *Hastings Mfg. Co.* v. *FTC*, 153 F.2d 253, 254, 258 (6th Cir. 1946), nor would we consider it to be defensible public policy.

Alleghany Pharmacal in effect, *Id.* at 1036. Moreover, the hearing examiner's unadopted, recommended decision in *Alleghany* found, at most, that PPA is an "effective appetite depressant in the treatment of obesity," *Id.* at 1033.[21] This conclusion falls far short of a finding of significant weight losses by substantially all users.

Respondents also contend that they relied on evidence discussed in the *Alleghany* decision (RB 21). However, respondents did not possess anything more than the discussion of these materials contained in *Alleghany* itself and, as the ALJ found (I.D. 61), the discussion, putting aside the inconclusive disposition of the case, does not support X-11 advertising claims.

The first example cited is a test done by Dr. Edward Settel, who testified in *Alleghany* that he had done a study of 30 persons who were 10 percent or more overweight. The entire group was on a 900 calorie a day diet. No further details of the study are provided. Dr. Settel concluded that PPA is a "more effective anorexiant agent" than a placebo. He did not testify as to the extent of weight [19] loss, if any, of the persons tested. 75 F.T.C. at 1016–1017. Dr. Frederick B. Bohensky testified that he had treated several thousand patients for obesity in his practice in Brooklyn, was familiar with PPA, used it in his practice, had tested it on dogs, and concluded that it was an "effective anorexigenic and weight reducing agency" in dosages of 75 mg. per day. *Id.* at 1019–1020. Dr. Theodore Feinblatt testified that, on the basis of a study he had done, a 75 mg. dose of PPA "effective as an anorexiant agent for the treatment of obesity." No details of the study are mentioned *Id.* at 1023. Dr. Raymond W. Healy, a general practitioner primarily interested in obesity, had been giving his patients amphetamine to reduce their appetites while they were on low calorie diets. He gave 30 patients PPA instead, and concluded that PPA was "effective in reducing the appetite in about 80 percent of his patients involved in the test." *Id.* at 1022. Dr. Harold Silverman criticized a study relied upon in an FDA proceeding against a similar product,[22] which was done by Dr. Joseph F. Fazekas. *Id.* at 1027. Dr. Fazekas had concluded that PPA "does not possess significant anorexigenic potency," *60 28-Capsule Bottles,* 211 F. Supp. at 209. Dr. Silverman's article made no claims of specific amounts of weight losses associated with PPA (I.D. 92).

The hearing examiner in *Alleghany* also discussed excerpts from medical literature which stated that: PPA is "useful to kill the appetite" [Hirsh] [Hirsh had actually repudiated that statement by

[21] *But see United States* v. *60 28-Capsule Bottles, More or Less, Etc.*, 211 F. Supp. 207 (D. N.J. 1962), *aff'd*, 325 F.2d 513 (3d Cir. 1963).

[22] *Id.*, n. 20.

the time of the Alleghany trial, see I.D. 92], 75 F.T.C. at 1009; "used . . . to depress appetite" [Grollman], *id.;* "employed . . . as an anorexiant" [Merck Index], *id.,* at 1010; listed with amphetamines as an appetite depressant [Leake], *id.;* less effective than amphetamines in the control of obesity [Sollmann], [20] *id.;* used in controlling appetite [Drill], *id.,* at 1011; "sometimes used to reduce appetite" [Laurence], *id.,* or is used for obesity [Remington's], *id.* No dosages are mentioned, no statements as to the effectiveness of PPA in appetite suppression are made (other than "useful"), no tests of the product in obesity control are mentioned; and no mention of weight losses of any degree appear in the discussion of this literature. *See* I.D. 70. Respondents also mention literature by "Kalb." We find no reference to Kalb in *Alleghany.*

None of this discussion supports the conclusion that "substantially all users of X–11 tablets will lose a significant amount of weight," since no weight losses are quantified and it is not clear whether weight losses of any quantity might be achieved by "substantially all" users of PPA in the dosages provided in X–11 tablets.

These various suggestions of PPA efficacy were placed in proper perspective by the testimony of several experts, including those of respondents. For example, Dr. Fineberg had never used PPA in his practice and could not say whether PPA would be effective in a 25 mg. dosage for the "normal run of people" (I.D. 90). Dr. Silverman made no claims "of specific amounts of weight loss associated with" PPA (I.D. 92). He did say that 75 mg. of PPA per day used in conjunction with a 1,200 calorie per day diet would bring about a significant decrease in weight in time (I.D. 93), but in a four-week study he performed with two groups on such diets, one using PPA and the other a placebo, the difference was a loss of only one-half or less than one-half pound per week, which, according to other testimony, is "clinically trivial" in obese persons, and, as the law judge found, "particularly in the absence of evidence that such loss can be continued" (I.D. 101–109). Dr. Hoebel, who also testified for respondents, also did a four-week study of the effectiveness of PPA, and also found a loss of a fraction of a pound per week associated with PPA (I.D. 118). That study was also criticized by complaint counsel's expert witnesses (I.D. 119–122), and Dr. Hoebel himself wrote that his "evidence for a statistically significant weight loss in a two-week period does not mean that this rate of loss would be continued over longer periods" (I.D. 120). [21]

The two 1957 FDA letters suggest that FDA permitted an "indications for use" labeling on a PPA product to read "useful as an appetite suppressant in the *dietary* management of obesity" (empha-

sis added). Like the other information in respondents' possession, these letters do not establish that significant weight losses may be achieved with PPA, with or without dieting.

Like Porter & Dietsch, Pay'n Save did not test X–11 and has done no research in medical literature as to its effectiveness. Pay'n Save "looked at, but did not critically examine" X–11 advertising, read the "plan," noted that the product was similar to others on the market, and assumed that the product must perform as advertised (RB 5–6).[23] We find that Pay'n Save, like Porter & Dietsch, had no substantiation whatever for the claim that "substantially all users of X–11 tablets will lose a significant amount of weight" at the time Pay'n Save disseminated X–11 advertising.

We conclude that respondents' advertising is false and misleading, because it implicitly represents that "substantially all users of X–11 tablets will lose a significant amount of weight" and that respondents possess competent scientific evidence supporting that claim, even though respondents did not have a reasonable basis for making such a claim at the time the advertising was disseminated. [22]

Failures to Disclose Material Facts

The complaint also alleges that respondents' advertisements were false because, in the words of the relevant statute, they "failed to reveal facts material in the light of [the] representations [made] or material with respect to consequences which may result from the use of the commodity to which the advertisement related under the conditions prescribed in said advertisement, or under such conditions as are customary or usual." The three alleged non-disclosures are: that the typical and ordinary experiences of consumers do not parallel the experiences reported in testimonials appearing in the advertisements (¶11); that a highly restricted caloric diet is a part of the X–11 plan (¶13); and that persons with high blood pressure, heart disease, diabetes or thyroid disease should only use X–11 tablets as directed by a physician (¶12). The ALJ found that all three of these non-disclosures violate the FTC Act. (I.D. 125–140)

We affirm all three of these conclusions.

Testimonials Respondents are charged with having failed to disclose material facts concerning testimonials used in their advertising, namely, the "typical or ordinary experience" of users of X–11 (¶11), making the advertising misleading (¶14). The ALJ found that respondents advertised testimonials proclaiming "I LOST OVER

[23] Pay'n Save also relied on the reputation of a manufacturer's representative, the fact that others advertised X–11, a Pharmacy Supervisor's recollection that he had been told in pharmacy school that PPA has been used as an appetite suppressant, and the fact that no consumer complaints were received (RB 16–17).

40 LBS.," "I LOST 80 LBS!" and others (I.D. 125). The smallest weight loss advertised is 40 pounds; the highest, 83 pounds (I.D. 126). He found that, by such representations, and other statements in the advertising, respondents left the impression that such large weight losses are typical with X–11 use. Testimonials of ordinary consumers were presented accompanied by statements such as "from Georgia to Nebraska to California American women have found a way that really helps off that ugly fat" (I.D. 126); "amazingly easy," "extraordinary simple" [sic], "more easily than you ever dreamed possible" (I.D. 12); and "RESULTS ARE GUARANTEED" (I.D. 12). [23]

The challenged testimonials did not appear in isolation and we have not read them that way. They were part and parcel of advertisements which, as we have found, claimed by implication that substantially all users of X–11 tablets would lose a significant amount of weight. The testimonials both fed this claim and drew sustenance from it. The net impression, as the ALJ found, is that the testimonials conveyed the message that extraordinarily large weight losses were typical or ordinary.

In fact, it is extremely rare for obese individuals to lose as much weight as depicted in the ads. (I.D. 126–129)

Restricted Diet For reasons that are apparent and that have already been mentioned (pages 8–9 above), we affirm the ALJ's findings and conclusions that respondents violated the FTC Act by failing to disclose that a highly restricted caloric diet is part of the X–11 regimen. Indeed, respondents concede that if their advertising is construed to promise weight reduction without dieting, as we find it did, then such a representation is false.

Safety of X–11 The final failure-to-disclose allegation concerns the safety of using X–11 tablets. An insert accompanying each package of X–11 tablets contains the following advice: "CAUTION: Individuals with high blood pressure, heart disease, diabetes or thyroid disease should use only as directed by a physician. . . ." The veracity of this warning is not disputed but the complaint challenged its sufficiency. The ALJ found that the failure of respondents to disclose these potentially hazardous consequences in their advertisements constituted false advertising (I.D. 139).

A majority of the Commission[24] agrees and adopts the ALJ's findings on this issue (I.D. 130–139). Respondents made strong, affirmative claims for their product. By failing to disclose in advertising that potentially serious health risks are associated with the use of X–11 they deprive consumers of an important and

[24] Commissioners Collier and Clanton dissent from the Commission's decision on this issue for the reasons set forth in Commissioner Collier's separate views.

material fact. The Commission finds this failure violates the letter and spirit of Section 12, and thereby Section 5. [24]

Defenses

Liability of Joseph Furth and Pay'n Save Two of the respondents, Joseph Furth and Pay'n Save object to their liability for the false advertising.

Mr. Furth objects to one of the ALJ's findings that he formulated, directed, and controlled the practices we find unlawful (RB 35). Paragraph 1 of the complaint charged that Furth "formulates, directs and controls certain acts and practices of [Kelly Ketting Furth, Inc.], *including the acts and practices hereinafter set forth*" (emphasis added). Furth's answer admits that he "formulates, directs and controls certain of its acts and practices." The Commission's Rules of Practice and Procedure provide that:

> An answer in which the allegations of a complaint are contested shall contain . . . specific admission, denial, or explanation of each fact alleged in the complaint or, if the respondent is without knowledge thereof, a statement to that effect. *Allegations of a complaint not thus answered shall be deemed to have been admitted.*

(Emphasis added.) 16 C.F.R. 3.12(b)(1)(ii). In view of the complaint's allegation, Furth's answer, and by operation of the rule, the ALJ was clearly correct in relying on the pleadings in his finding that Furth "is among those responsible for the formulation, direction and control of its acts and practices, including those alleged in the complaint." While the respondents as a group denied most of the allegations of unlawful conduct, Furth, by his answer, admitted his personal involvement for his principal, Kelly Ketting Furth, Inc., in the conduct that was subject to challenge.

Moreover, Furth does not contest Finding 143 which points to the same conclusion as the finding he challenges.[25] Furth's active role in formulating the advertising is not diminished, as respondents imply (RB 35–36), because he was "merely an employee" (a vice-president) of Kelly Ketting Furth or had to clear the initial acceptance of the Porter & Dietsch account with someone else. [25]

There is no dispute that Pay'n Save had no role in preparing X–11 advertising, but it did disseminate, in its own name, advertisements provided by Porter & Dietsch, either directly, or by paying for the placement of ads sent to news media by Porter & Dietsch (I.D. p. 106). Pay'n Save contends that it should not be held to an order because,

[25] *See also* respondents' "Answers to Request for Admissions," November 8, 1975, at 6, responding to complaint counsel's request for admissions of October 21, 1975, at 4.

as a retailer disseminating advertising prepared by another, it had no way of verifying the claims it was disseminating.

We find that Pay'n Save has violated Section 12 of the FTC Act, as alleged in the complaint. Section 12 provides that it is "unlawful for any person, partnership, or corporation to *disseminate, or cause to be disseminated,* any false advertisement . . . for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices or cosmetics . . ." (emphasis added).

We find that X-11 advertisements are "false advertisements" under Section 15,[26] and there can be no dispute that, by placing X-11 advertising, Pay'n Save "disseminated" it.[27] Section 12 does not provide any exemption for retailers who receive the advertisements they disseminate from others.[28]

It would appear to be no accident that Section 12 does not contain such an exemption. In Section 14, Congress attempted to deter the false advertising of food, drugs, devices, and cosmetics hazardous to consumer health (a subset of advertising prohibited by Section 12) by making it a misdemeanor to [26] disseminate such advertising with the intent to defraud or mislead. That section does not apply to any "publisher," radio-broadcast licensee, or agency or medium for the dissemination of advertising," in order to "avoid unwarranted hardship on the person who has conducted his business with proper prudence," H.R. Rep. No. 1613, 75th Cong., 1st Sess. 7 (1937). In hearings on predecessor legislation, Congress heard testimony to the effect that the media (like retailers, in the view of Pay'n Save) could not realistically test the veracity of claims they disseminated.[29] However, the "manufacturer, packer, distributor, or seller of the commodity to which the false advertisement relates" is expressly denied the exemption. The unmistakable implication is that such

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[26] Although the ALJ did not find that Pay'n Save either disseminated the advertising in commerce or disseminated advertising for the purpose of, or which was likely to, induce purchases in commerce, with minor modifications we adopt complaint counsel's proposed finding 32, that Pay'n Save has caused X-11 advertising to be published in media of interstate circulation (and has therefore disseminated the advertising "in commerce"), which is supported by admissions and stipulations in the record and is uncontested. *See* Appendix.

[27] Counsel for Pay'n Save conceded as much at oral argument (Tr. of oral argument, p. 29).

[28] *Id.*, at 30.

[29] *See To Amend the Federal Trade Commission Act: Hearings on S. 3744 Before the Sen. Comm. on Interstate Commerce,* 74th Cong., 2d Sess. 68–69 (1936) (statement of C. B. Larrabee, representing the Legislative Committee of the National Publishers' Assn.); *Federal Trade Commission Act Amendments: Hearing on S. 3744 Before the House Comm. on Interstate and Foreign Commerce,* 74th Cong., 2d Sess. 68 (1936) (statement of William L. Daley, Washington Manager, National Editorial Assn.). Falsely advertised diet remedies were a specific concern. *See* 83 Cong. Rec. 415 (1938). A major impetus to the legislation was the Supreme Court's holding in *FTC* v. *Raladam Co.*, 283 U.S. 643 (1931), that the Commission had no jurisdiction to prevent, without a showing of injury to competition, the false advertising of a thyroid extract sold as a diet remedy. The predecessor legislation, S. 3744, 74th Cong., 2d Sess., did not incorporate language similar to that found in Sections 12–15; however, like Section 3 of the Wheeler-Lea Amendments (S. 1077, 75th Cong., 1st Sess., enacted as Pub. Law No. 447), the bill would have amended Section 5 to make it clear that false and misleading advertising ("unfair or deceptive acts or practices") is within the Commission's jurisdiction regardless of its effect on competition.

persons are subject to §12 as well as to Section 14. There can be no question that Pay'n Save is a "distributor" or "seller" of X–11. [27]

In light of the plain language of Section 12, we decline to adopt Pay'n Save's "flexible standard" of Section 12 liability, which would require us to except all but those who were "principals" in the preparation of advertising copy.[30] As Pay'n Save admits, nothing in the legislative history of Section 12 supports such an exception.[31] Moreover, we think it is not unreasonable for Congress to impose higher obligations on disseminator-distributors of advertising for food, drugs, (medical) devices, and cosmetics (items which may carry a potential for injury to health and safety).[32]

Nor do we consider this result harsh in the circumstances. Pay'n Save is a substantial company operating 140 retail stores, 92 of which are drug stores (RB 2). It runs only 30 or 40 advertisements prepared by its suppliers (Tr. 514, 566). Pay'n Save "looked at, but did not critically examine" X–11 advertising and reviewed the package insert revealing the "plan" (Tr. 531, 561). If Pay'n Save had critically examined the advertising in light of the package insert, it should have been obvious that the advertising at least did not coincide with the plan.

Collateral Estoppel As we have noted above in discussing the falsity of respondents' advertising, this is not the first occasion on which the Federal Government has challenged conduct of sellers of products containing PPA sold as a weight reduction preparation. *See Alleghany, supra,* at 15; *Hanover House, supra,* n. 19 at 16; and *60 28–Capsule Bottles* ("Unitrol"), *supra,* n. 21 at 18. In addition to asserting that these cases (except the Unitrol decision) support the truth of their advertising claims, respondents argue that they collaterally estop the Commission from a finding of liability in this case as to ¶¶9A and B, 10A and B, and 12 of the complaint. [28]

We reject this argument for several reasons. First, the truth of these respondents' advertising claims were simply not litigated in those proceedings. Moreover, the Commission decision to which we are referred was not a final adjudication but was, instead, dismissed without prejudice after the ALJ concluded that other challenges to other advertisements had not been established by a preponderance of the evidence. There can be no bar of collateral estoppel on these facts.[33]

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[30] We intimate no view on the question whether or under what conditions such an approach would be appropriate under Section 5 of the FTC Act.

[31] Tr. of oral argument, at 29–31. *See also Mueller* v. *United States,* 262 F.2d 443, 446 (5th Cir. 1958) ("The term 'cause' is in the statute without any qualification relating to the advertiser's state of mind.").

[32] *See* Prosser, *Torts* 653–654 (4th Ed. 1971).

[33] Because the doctrine of collateral estoppel does not apply where different issues are tried, where different legal standards are applied, or where a dismissal without prejudice terminates the earlier litigation [*see George H.*

(Continued)

Location and Scheduling of Hearings The hearings were held in Seattle and Washington, D.C. on eight days between January 7, and January 26, 1976 (I.D. p. 7). In orders of December 3, 19, and 30, 1975, the law judge established the hearing sites and the hearing schedule. He noted that no one place was wholly satisfactory, because the witnesses to be called were dispersed into a number of locations, including Anchorage; Seattle; the San Francisco area; Los Angeles; Radnor, Pennsylvania; Minneapolis; Chicago; Miami; Boston; Baltimore; New York; and Princeton, New Jersey. The two individual respondents were located in St. Paul and Chicago, and all counsel in the proceeding were located in either Washington, D.C. or Seattle.[34]

[29] Respondents do not contend that their defense was impaired by the location or scheduling of the hearings, nor would the record support that claim.[35] Instead, they refer to the inconvenience encountered by the individual respondents in traveling to Washington, D.C. to testify (RB 2; RRB 9). However, in response to complaint counsel's motion to designate Seattle and Washington, D.C. as hearing sites, respondents' counsel expressed a willingness to designate "Chicago, Illinois, or, in the alternative, Washington, D.C."[36] Respondents cannot now contend that Washington, D.C. was an "inconvenient" location.[37]

[30] Respondents also argue that the complaint must be dismissed because complaint counsel did not prove that the hearing schedule was expeditious before the hearings took place, whether or not, in hindsight, the hearings were in fact expeditious (RRB 6), relying on *Universe Chemicals, Inc.*, 75 F.T.C. 1069 (1969). *Universe Chemicals* was decided when Section 3.41(b) of the Commission's Rules allowed the designation of multiple hearing sites only "in unusual and exceptional circumstances for good cause stated on the record."

Lee Co. v. *FTC*, 113 F.2d 583, 585 (8th Cir. 1940); *United States* v. *Willard Tablet Co.*, 141 F.2d 141, 143 (7th Cir. 1944); *Hastings Mfg. Co.* v. *FTC*, 153 F.2d 253, 255 (6th Cir. 1946)], we need not delve the legal question of the extent to which an administrative agency in pursuit of the public interest such as the Commission is bound by that doctrine, or whether an earlier finding that rests on then-current technical and scientific knowledge, once made, is insulated from later challenges based on new evidence or later developments and discoveries.

[34] "Order Directing Hearings in Seattle and Washington, D.C.," December 3, 1975, at 2.

[35] For that reason, *Jeffries* v. *Olesen*, 121 F. Supp. 463 (S.D. Calif. 1954) is inapposite. There a respondent in a Post Office proceeding had no funds to appear at a hearing in Washington, D.C. and was unable to present his defense.

[36] "Answer to Complaint Counsels' Motion to Designate Seattle and Washington, D.C. as the Locations for Hearings," November 18, 1975, at 10. Counsel for Pay'n Save Corporation concurred in that pleading, "Revised Statement of Pay'n Save Corporation with Respect to Location of Hearings," November 26, 1975, at 1.

[37] In choosing a hearing site, the ALJ was obligated to consider the convenience of the agency in addition to the convenience of respondents, because the term "parties" in the Administrative Procedure Act, 5 U.S.C. 554(b), 555(b), includes agency parties, *Maremont Corp.* v. *FTC*, 431 F.2d 124 (7th Cir. 1970); *Burnham Trucking Co.* v. *United States*, 216 F. Supp. 561 (D. Mass. 1963); Sen. Rep. No. 752, 79th Cong., 1st Sess. 17 (1945). Respondents also offer us a chart which purports to show that the total air miles traveled by all participants in the hearings were 22 percent greater than they would have been if all hearings had been held in Chicago or Washington, D.C. (RB, "Appendix A-1"). We do not see the relevance of this calculation to either the expeditiousness of the hearings or to the convenience of respondents.

Under the current rule, promulgated well before this proceeding began, 37 F.R. 5609 (1972), there is no longer any such requirement. In this case, the hearings were expeditious, consuming only 8 days over a three-week period.

We conclude that the ALJ did not abuse his discretion, and respondents have not been prejudiced in any cognizable way by the location or scheduling of the hearings.

Miscellaneous Objections Respondents also contend that they were misled by the ALJ and by complaint counsel's "shifting position" on the relevance of the efficacy of PPA (RB 29–30; RRB 30–32). We find it hard to believe that respondents were unfairly confused by the discussions among counsel and the ALJ which are cited to us. As the ALJ pointed out, it was not the efficacy of PPA *per se* that was put in issue by the Commission's complaint, but rather the veracity of X–11 advertising claims. The efficacy of PPA was deemed relevant only insofar as it is an ingredient of the product for which claims are made.

Moreover, the alleged prejudice is that, after respondents' counsel understood the issue "it was . . . too late to cross-examine Drs. Margen and Drenick on the 'degree of effectiveness' [of PPA]" (RB 29). But respondents did in fact cross-examine Dr. Margen extensively as to his views on the effectiveness of PPA (see Tr. 294–326), including cross-examination as to his interpretation of a study by Dr. Hoebel, on which respondents rely to establish the effectiveness of PPA. Respondents also cross-examined Dr. Drenick as to the sufficiency of studies and medical literature concerning the efficacy of PPA (Tr. 466–476). Respondents [31] had ample opportunity to present evidence and testimony concerning the efficacy of PPA insofar as it related to their advertising claims, and they did so. Indeed the purported efficacy of PPA in suppressing appetite was the cornerstone of their defense. There has been no error. *Murray Space Shoe Corp.*, 59 F.T.C. 803, 828–829 (1961), *aff'd*, 304 F.2d 270 (2d Cir. 1962); *Trade Union Courier Publishing Corp.*, 51 F.T.C. 1275, 1295 (1955). Finally, since respondents failed to request that Drs. Margen or Drenick be recalled once the scope of the inquiry was clarified in their minds, they waived any claim of error.

Respondents next argue that the proceedings against them are not in the public interest since others are engaged in similar practices. We are told that consumers with a proclivity for purchasing deceptively advertised weight reduction preparations will still be able to satisfy their demand.

We reject this variation on the old theme of selective enforcement. Official proceedings against law violators could seldom, if ever, be

brought were such a theory to be approved. Rules of conduct adopted by governments are seldom self enforcing and seldom obeyed universally. Detection and apprehension of all violators simply cannot be a precondition to the prosecution of each violator. Moreover, proceeding against all violators would be an illusory solution to this perennial dilemma since someone not currently a violator might become one tomorrow.[38]

[32] In addition to these objections, respondents argue that the delays encountered in investigating and challenging their advertising claims demonstrate a lack of public interest in these proceedings. In our opinion, this contention is without legal force.[39] It is directed basically at the wisdom of expending limited public resources to correct particular law violations, a decision that is committed to the Commission's discretion. That bridge was crossed for the last time over two years ago when the Commission issued the complaint in this case.[40]

At oral argument, respondents raised a number of additional objections: that the Commission had no "reason to believe" that Kelly Ketting Furth and Joseph Furth had violated the FTC Act at the time the complaint issued (Tr. 5–6)[41]; that a news release announcing issuance of the complaint caused some Porter & Dietsch customers to cancel orders (Tr. 6, 14); that respondents had an inadequate opportunity to negotiate a consent settlement (Tr. 6, 10); and that the law judge was biased (Tr. 6, 19). None of these objections has any merit. [33]

The complaint itself set forth the basis for the Commission's reason to believe that a law violation had occurred and that a proceeding would be in the public interest. The complaint was clearly adequate in all respects and the allegations were fully and fairly adjudicated. There was no need to try the issuance of the complaint itself or to adjudicate the investigation that preceded it.

At least some incidental individual loss is unavoidable when public rights are adjudicated, as they must be, in public forums. *FTC* v. *Cinderella Career and Finishing Schools, Inc.*, 404 F.2d 1308, 1312–1316 (D.C. Cir. 1968). There is no suggestion that the press releases announcing the initiation of this action were factually incorrect or

[38] Under 15 U.S.C. 45(m), the Commission is free to hold other concerns to the same standards we are imposing on these respondents, when the order we will enter becomes final.

[39] The existence of prior investigations which were not pursued is no bar to this action. *See Parke, Austin & Lipscomb* v. *FTC*, 142 F.2d 437, 441 (2d Cir. 1944).

[40] For the same reason, we decline to dismiss this proceeding simply because X–11 tablets are relatively inexpensive, selling for $3.00 or $5.00 a box, and because consumers may be able to discern the efficacy of the product by using it. (*See*, RRB 16–17).

[41] No facts are cited in support of the allegation, although at oral argument counsel did mention that he had refused to respond to questions concerning Kelly Ketting Furth and Joseph Furth before the complaint issued (Tr. 11).

that they evidenced prejudgment or bias on the part of the Commission. We therefore decline to disturb our earlier rulings on respondents' interlocutory motions regarding the press releases, 86 F.T.C. 896, 1570 (1975).

Respondents concede that the Commission's staff engaged in consent negotiations with them before the complaint issued, but, after "about 14 telephone calls,"[42] the parties could not agree. Of course, respondents could have engaged in consent negotiations after the complaint issued if they had wished, and under the Commission's Rules of Practice, 16 C.F.R. 3.25, could have unilaterally offered the Commission a consent order which would present a "likelihood of settlement." Respondents simply have not been denied the opportunity to settle this matter.

The evidence presented to demonstrate the ALJ's alleged "bias" is one passage of the initial decision, at 94, where he read *Stauffer Laboratories, Inc.* v. *FTC*, 343 F.2d 75 (9th Cir. 1965) as indicating that Stauffer had relied on *Carlay* on appeal. Respondents point out that there is no mention of *Carlay* in the court's decision.[43] The finding will be [34] modified to correct the ALJ's error, *infra*. However, we fail to see how his mistake evidences "bias," nor do respondents provide any authority in support of their contention.[44]

Relief

The ALJ has proposed a cease and desist order substantially similar to the detailed notice order attached to the Commission's complaint. We will revise the order in conformity with this opinion and to prevent problems of enforcement which reside in the wording of some of its provisions.

We first consider the product coverage as to the various respondents. We believe the proposed order as to Porter & Dietsch and William H. Fraser is too narrow in scope. The first paragraph of the order would only apply to the advertising of X-11 tablets, preparations of "similar composition or similar properties," or dietary aids "containing phenylpropanolamine." Although X-11 represents the bulk of Porter & Dietsch sales (I.D. 1), we find that Porter & Dietsch is "continuously trying new products" (Tr. 765), and has marketed a

[42] Tr. of oral argument at 10.

[43] The opinion does indicate that Stauffer argued that the Commission had to consider a vibrating couch an inextricable part of the Stauffer reducing "plan" as a matter of law, 343 F.2d at 78.

[44] We also reject respondents' contentions, at RB 35-58, that the ALJ's findings in any way bespeak "bias" or "prejudice." The only "bias" cited is his rejection of respondents' position. Finally, we reject respondents' contention (RB 58) that they have been denied adequate time and appeal brief pages (in excess of the limits imposed by the Commission's Rules of Practice). Respondents were given an extension of 20 days to file their appeal briefs and together filed a total of 163 pages of argument and other materials.

number over the years (Tr. 754–766, 817–819), including another diet "plan" (Tr. 758).[45] Porter & Dietsch, as a wholesale operation securing its products from others (I.D. 1, 9; Tr. 766), is not faced with the expense of modifying manufacturing facilities as new products are added to its line. Porter & Dietsch and William H. Fraser have been marketing X–11 for years, first disseminating X–11 "plan" advertising in July, 1968 (Tr. 932–939). [35]

The practice of deceptively advertising a diet remedy, with or without a "plan," is not uniquely suited to products containing PPA or ingredients of "similar composition or similar properties." As we have seen, deceptions involving diet remedies have related to a wide variety of foods, drugs, devices, and cosmetics, the common thread being that human vanity and concern for health, and the inability to cope with the self-discipline of dieting, are preyed upon by making promises which cannot be kept.[46] Finally, we note that Mr. Fraser and wholly-owned subsidiaries of Porter & Dietsch have run afoul of our statute before.[47] For these reasons, we will enter an order as to Porter & Dietsch and William H. Fraser covering any "food," "drug," "cosmetic" or "device," as these terms are defined by the Federal Trade Commission Act.

For similar reasons, the product coverage of those provisions of the order pertaining to Kelly Ketting Furth or Joseph Furth should not be limited to X–11 or dietary aids containing PPA. Kelly Ketting Furth and Joseph Furth have handled X–11 advertising since its inception, and played an active role in its development and dissemination. Advertising agencies are even less restricted in their ability to use similar deceptive practices in connection with other products than wholesale and retail distributors. Particularly mindful of Mr. Furth's open acknowledgement that "the pills will not reduce weight an iota" (CX 164), we find that an order applicable to all diet remedies should be entered against Mr. Furth and Kelly Ketting Furth. [36]

Finally, we reject Pay'n Save's contention that the order as to it should be confined to the advertising of X–11 tablets alone, and "should recite that Pay'n Save's lack of knowledge of, or reason to know of, the falsity or deception of any future ad will be a defense to

[45] It is not clear whether this product would be covered by the ALJ's proposed order or not, because the record does not reveal the product's composition.

[46] *See* n. 8, *supra* at 10.

[47] *Udga, Inc., and William Fraser and Mary Fraser*, F.T.C. Dkt. 2830, 24 F.T.C. 1245 (1937) (antacid deceptively advertised as a cure for ulcers) (Tr. 754). Mr. Fraser is also subject to a Commission consent order, *Ru-Ex, Inc.*, F.T.C. Dkt. C–1, 59 F.T.C. 839 (1961), which we do not consider in "aggravation," *ITT Continental Baking Co., Inc. v. FTC*, 532 F.2d 207, 223 (2d Cir. 1976), but in possible "mitigation" of the need for a broad order in this instance. We find that that order would not apply to diet remedies, since it is limited to products similar to the one sold as an arthritis or rheumatism remedy in that case.

any future charge" (RB 26). There is no such defense to Section 12 of the FTC Act and it would therefore be inappropriate to write such a defense into the order. Moreover, we believe that the order coverage should be expanded to include any food, drug, cosmetic, or device held out as a diet remedy As we have noted, X-11 is not a product uniquely suited to the dissemination of false advertisements promising weight loss. Pay'n Save has carried "several similar products" for many years (Tr. 507), and as a chain store retailer, Pay'n Save can easily shift its product lines.[48] Pay'n Save could as easily decline to examine "critically" the advertising copy of other distributors of diet remedies.[49] Finally, we note that Pay'n Save has been advertising X-11 since 1969 or 1970 (Tr. 508). We are not dealing with an isolated incident. These factors, and the apparent attraction in deceptively advertising diet remedies, exhibited by the Commission's experience of over 50 years in finding innumerable variations of this deception, *supra,* n. 8 at 10, justify a comprehensive order.

In short, we conclude that the order should not be limited to X-11, products of similar composition, or those containing PPA. We will enter an order as to Kelly Ketting Furth, Mr. Furth and Pay'n Save, applying to the advertising of any food, drug, cosmetic or device held out as a diet remedy. As to Porter & Dietsch and William H. Fraser, the order will apply to any food, drug, cosmetic or device.

These changes in product coverage will also apply to the constraints on the use of testimonials or claims of unique ingredients. We have further modified the order provision concerning testimonials so as simply to prohibit [37] respondents from representing directly or by implication that the testimonial reflects the typical experience of users of the product unless, in fact, it does. In addition we would observe that even where respondents do not represent that a testimonial reflects the typical experience of users, respondents may not employ testimonials which reflect the unusual experience of a tiny minority to suggest that a product is generally efficacious, when in fact it is not. To underscore this point, we have expressly noted in order paragraphs I A. and I B. that testimonials, among other devices, may not be used to effect the misrepresentations prohibited by those paragraphs.

We think the proposed order provision, however, is unnecessarily broad. To prevent further deception as to the need to adhere to a

[48] Pay'n Save sells "literally thousands of products" (RRB 15), and disseminates 30 or 40 advertisements prepared by its suppliers (Tr. 514, 566). The record does not reveal how many of these 30 or 40 products are foods, drugs, cosmetics or devices sold as diet remedies.

[49] *See generally* Tr. 501-577. *See also Kraftco Corp.*, F.T.C. Dkt. 9035, 89 F.T.C. 46 (1977), 3 CCH Trade Reg. Rep. ¶21,263 at p. 21,170 n. 6, *appeal pending,* No. 77-4078 (2d Cir.); *Tashof* v. *FTC,* 437 F.2d 707, 715 (D.C. Cir. 1970).

restricted diet we will prohibit respondents from representing directly or by implication that the testimonial is the typical experience of users of the product unless, in fact, the testimonial is the typical experience of the users of the product.

Finally, we find four order provisions to be unnecessary or somewhat misdirected. First, the ALJ proposes to prohibit further unsubstantiated diet remedy advertising with an order provision applying to X–11 or "any other product potentially affecting human health or safety" and requiring "adequate, well-controlled scientific tests accepted as such by the Federal Trade Commission" as substantiation for efficacy claims. The substantiation, including the "original data" supporting any tests, would have to be furnished to the Commission in advance "as documents available for public inspection," and copies of summaries of the test results and methodologies employed would have to be made available through the mail on request. The availability of the summaries would have to be disclosed clearly and conspicuously in advertising (I.D. p. 112–113).

We have eliminated the requirements that respondents pre-clear their substantiation materials with the Commission before disseminating them to the public and that they prepare and distribute summaries of such materials. Although respondents have made little effort to substantiate their claims, we doubt that a pre-clearance procedure for their future advertising copy is needed or desirable, and we doubt that most consumers would care to see the details of respondents' substantiation. More probably, consumers would prefer to be in a position to rely on the advertising claims without the trouble and expense of investigating the substantiation for themselves. Therefore, we believe that it would [38] be sufficient to require adequate substantiation for advertising claims and to require respondents to submit compliance reports for five years, so that the Commission can assure itself, in light of respondents' past disregard for the requirements of our statute, that the order is being obeyed. The order will be modified accordingly.

Second, the proposed order would also require respondents to reveal the amount of weight loss, on a "per-week basis" that might be expected from the use of X–11 or similar products, based upon "adequate, well-controlled scientific tests" if weight loss is advertised as a result of use of the products (I.D. pp. 114–115). As the record indicates, "per-week" weight losses may be deceptive because initial weight losses in the course of a dietary regimen generally are not sustained for an extended period (I.D. 68, 76–77, 83, 95, 107, 120). In addition, we believe that a requirement that respondents possess

adequate substantiation for their advertising claims including general claims will suffice to correct the deceptions we have found. We will therefore omit this provision from the order.

Third, the ALJ proposes that the Commission require an affirmative disclosure of the need to diet, the lack of evidence that significant or lasting weight losses will be assisted, and the FDA-mandated label warning in all advertising of X–11 or similar products. We agree that, to prevent further deception, consumers should be told that X–11, products of similar composition, and products containing PPA (or methylcellulose) will not assist in weight loss without adherence to a restricted diet, and may not in any way promote significant or lasting weight losses. Any advertising of such products as diet remedies without affirmative disclosure of these facts would be misleading to consumers, who, as we have found, may be expected to purchase diet remedies to avoid the self-discipline of low-[39]calorie diets. The mere holding out of such products as diet remedies without these disclosures would therefore be misleading.[50] A majority of the Commission[51] also agrees that future advertising for X–11 or similar products should warn of the health risks associated with its use. However, it believes a disclosure less lengthy than the FDA-mandated warning will provide consumers with adequate notice. The order provision is accordingly modified.

Fourth, the ALJ would also prohibit respondents from "attempting to mislead or misleading the public that a 'plan,' 'regimen' or 'program' is being offered when in truth respondents are simply marketing X–11 tablets, or one of the foregoing preparations, products, or aids" (I.D. p. 115). The deception is not in the offering of a "plan," but in the failure to disclose that the "plan" involves a stringent diet. We will enter an order requiring disclosure of the need to diet and will omit the ALJ's proposed order provision.

We find that the other provisions of the order that the ALJ recommends are necessary and appropriate to insure that false and deceptive advertising is recalled and ceased.

An appropriate order is appended.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of respondents from the initial decision, and upon briefs and

[50] Should the state of medical knowledge change and provide support for the efficacy of such products, respondents will, of course, be free to petition the Commission for a modification of the order under Section 3.72 of our Rules.

[51] Commissioners Collier and Clanton dissent from the Commission's decision on this issue for the reasons set forth in Commissioner Collier's separate views.

oral argument in support thereof and opposition thereto, and the Commission for the reasons stated in the accompanying Opinion having determined to sustain the initial decision with certain modifications:

It is ordered, That the initial decision of the administrative law judge, pages 1–111, be adopted as the Findings of Fact and Conclusions of Law of the Commission, except to the extent modified or otherwise indicated in the accompanying Opinion. [2]

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

It is further ordered, That the following order to cease and desist be, and it hereby is, entered:

ORDER

I

It is ordered, That respondents Porter & Dietsch, Inc., a corporation, its successors and assigns, and its officers, and William H. Fraser, individually and as an officer of said corporation; and the agents, representatives and employees of the foregoing respondents, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, or distribution of any "food," "drug," "cosmetic" or "device" (as these terms are defined in the Federal Trade Commission Act) in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

A. Representing orally, in writing, or in any manner, directly or by implication, including through the use of testimonials that a user of such a product can lose weight without restricting his or her accustomed caloric intake or while he or she continues to eat the foods of his or her choice (or words or depictions of similar import or meaning);

B. Representing orally, in writing, or in any manner, directly or by implication, including through the use of testimonials that a user of such a product can achieve any result, unless at the time such representation is made it is fully and completely substantiated by competent scientific or medical tests or studies, with the results of the tests or studies, the original data collected in the course of the test or study (if performed by or at the request of or with financial assistance from any respondent), and a detailed description of how the test or study was performed available in written form for inspection by the Federal Trade Commission for at least three years following the final use of the representation; [3]

C. Representing orally, in writing, or in any manner, directly or by implication, that any testimonial for any such product represents the typical or ordinary experience of members of the public who use the product unless this is the case.

D. Representing orally, in writing, or in any manner, directly or by implication, that any such product contains one or more unique ingredients or components, unless respondents can establish that any such ingredients or components are unavailable in products sold by others.

E. Disseminating or causing to be disseminated by United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement for any such product containing phenylpropanolamine hydrochloride or similar ingredients with similar properties, or methylcellulose (whether or not such products contain other ingredients as well) or any product held out as a diet remedy or other remedy for the reduction of human body weight unless such advertising "clearly and conspicuously" (in print at least as large as the largest print appearing in the advertising or, in an oral presentation, in speech as clear and distinct as that delivered in the rest of the presentation) discloses the following statements, with nothing to the contrary or in mitigation of these statements:

DIETING IS REQUIRED
and
WARNING: THIS PRODUCT POSES A SERIOUS HEALTH RISK FOR SOME USERS. READ THE LABEL CAREFULLY BEFORE USING.

[4] II

It is further ordered, That respondents Kelly Ketting Furth, Inc., a corporation, its successors and assigns, and its officers, and Joseph Furth, individually and as an officer of said corporation; and Pay'n Save Corporation, a corporation, its successors and assigns, and its officers, agents, representatives; and employees of the foregoing respondents, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, of any "food," "drug," "cosmetic," or "device" (as these terms are defined in the Federal Trade Commission Act) held out as a diet remedy or other remedy for the reduction of human body weight, shall forthwith cease and desist from disseminating or causing to be disseminated by United States mail or by any means in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains a representation or testimonial for such product prohibited by Paragraph I of this order,

or which omits a disclosure for such product required by Paragraph I of this order.

III

It is further ordered, That each respondent forthwith deliver a copy of this order to each of its own operating divisions and subsidiaries, to all present and future personnel of respondents engaged in the preparation, creation or placing of advertising of foods, drugs or devices on behalf of respondents, and to all present and future agencies engaged in the preparation, creation or placing of such advertising for respondents, and that respondents secure from each such person and agency a signed statement acknowledging receipt of said order. [5]

IV

It is further ordered, That respondents immediately recall and retrieve, from all persons and entities that have engaged in the advertising or promotion of X-11 tablets within the past two years, all advertising mats and promotional material which contain a representation or testimonial prohibited by this order or which omit a disclosure required by this order. Respondents Porter & Dietsch, Inc., and William H. Fraser shall also deliver written notice of the requirements of this order to all distributors and retailers of products marketed by said respondents, and shall institute a program of continuing surveillance adequate to reveal whether they are complying with said requirements including the above recall provision. In the event that nonconformity with any such requirements is discovered, said respondents shall immediately cease supplying all products to said distributors or retailers until adequate, reliable assurance of conformity is obtained.

V

It is further ordered, That all respondents, their successors and assigns, shall maintain complete business records relative to the manner and form of their compliance with this order. Respondents shall retain each such record for at least three years, and shall retain for at least two years beyond the last dissemination of any representation or testimonial the documentation in support of and on which respondents relied in making such representation or testimonial. Upon reasonable notice, respondents shall make any and all such records available for inspection and photocopying by authorized representatives of the Federal Trade Commission at

respondents' place of business. For respondents Porter & Dietsch, Inc., and William H. Fraser, such records shall include (but not be limited to) all advertising, sales memoranda, the substantiation for all applicable advertising claims, correspondence with persons who place advertising, and other pertinent documents. [6]

VI

It is further ordered, That all respondents herein notify the Commission at least thirty (30) days prior to any proposed change in a corporate respondent, such as dissolution, assignment or sale resulting in the emergence of any successor corporation or corporations, the creation or dissolution of subsidiaries, or any other change in said corporations which may affect compliance obligations arising out of this order.

VII

It is further ordered, That each individual respondent named herein for a period of five (5) years from the effective date of this order promptly notify the Commission of the discontinuance of his present business or employment and/or of his affiliation with a new business or employment. If applicable each such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which he is newly engaged as well as a description of his duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

VIII

It is further ordered, That the respondents herein shall, within sixty (60) days after service of this order, and annually for five years thereafter, file with the Commission a written report setting forth in detail the manner and form of their compliance with this order. The expiration of the obligation to file such reports shall not affect any other obligation arising under this order.

Separate Statement of Commissioner Calvin J. Collier in which Commissioner David A. Clanton Concurs

There are certain specific portions of the majority decision from which I dissent. They are footnoted in the decision. My reasons follow.

Safety of X-11 The majority affirms the ALJ's decision that

respondents' failure to include FDA's required label warning message in their advertising violated duties imposed by sections 5 and 12 of our statute.

There is little evidence in this record to distinguish this case from all others in which health warnings are required to be or are voluntarily placed on packaging but are absent from advertising. The ALJ found that certain of the contraindicated medical conditions for PPA occur more frequently and with greater severity among the obese and overweight than in the population generally (I.D. 136). However, the correlations were not quantified, and nothing else is revealed about the conduct or behavior patterns of this population in relation to OTC drug use in general or weight reduction preparations in particular.

In other contexts, we have recently determined to deal with the relationships between mandatory labeling and advertising disclosures through rulemaking.[1] In the absence of other circumstances, this approach has several important advantages. For example, it permits interested persons to comment on such issues as the comprehensibility of labeling requirements communicated through other media and the net incremental health benefits of advertising disclosures. Finally, PPA, the ingredient of X–11 which precipitated the package insert warning, is found in a variety of over-the-counter drugs including other weight reduction preparations [2] and common decongestants.[2] In sum, I do not believe this case provides a sound factual or jurisprudential foundation for the majority's holding.

APPENDIX

The Findings of Fact and Conclusions of Law set out in the Initial Decision of the administrative law judge are adopted by the Commission except to the extent they are qualified or supplemented in the Commission's Opinion and in the Appendix.

The following Findings in the Initial Decision are modified as indicated:

I.D. 44: After "Tiny Tablet" in the seventh line of the finding, add:

(CX 1, 2, 11, 35, 46-48, 50, 52, 56, 58, 61-62 ["X–11 is the PROVEN and SOUND method . . ."], 74, 79)

At the end of the finding, add:

Some advertisements referred to "clinic tested ingredients" (CX 47, 49, 74); or stated that "The X–11 Reducing Plan is medically recognized as an effective plan to lose ugly fat" (CX 74).

[1] *See* Advertising for Over-the-Counter Drugs, 40 F.R. 52, 631 (1975); and Advertising for Over-the-Counter Antacids, 41 F.R. 14,534 (1976).

[2] Tr. of oral argument 46 (September 29, 1976). FDA is considering a monograph recognizing the drug as an effective nasal decongestant, 41 F.R. 38,400 (1976).

I.D. 60: Add, after "*supra*" in the last line, "and the following additional materials." Strike "(CX 122–26)" and substitute "(CX 122–130)." Substitute a colon for the period concluding the finding and add:

"(1) a hand-written statement that a Dr. Necheles believed that methylcellulose expands in the stomach (CX 125);
(2) a biographical sketch of Dr. Necheles (CX 126);
(3) a photocopy of a two-page statement edited by a Dr. Cyril Mitchell MacBryde, to the effect that obesity leads to increased mortality rates (CX 127);
(4) a photocopy of a two-page "product information" sheet from the Dow Chemical company describing its methylcellulose product, specifically how aqueous solutions of the product might be prepared, and describing the properties of such solutions (and mentioning that the product swells with hydration) (CX 128);
(5) a photocopy of two pages, one of which has been labeled, by hand, "U.S. Dispensatory," which indicates, among other things, that methylcellulose is "used as a laxative in chronic constipation," "imparts a sense of fullness in the patient," and "is sometimes employed in preparations intended to curb appetite in obese persons" (CX 129); and
(6) a photocopy of a letter dated February 24, 1969, from a "Butterfield Laboratories" which concluded that "methylcellulose when wetted does swell like a sponge" and that the 1967 edition of *Drugs of Choice*, edited by Walter Modell, indicated that "methylcellulose has been suggested as an appetite satiator for the treatment of obesity" (CX 130)."

Finally, add: "In addition, in his letter Mr. Gettleman mentioned two letters which FDA had written to other companies in 1957 concerning the labeling of products containing PPA, copies of which have been introduced into evidence as RX 16 and RX 17."

I.D. p. 94: Strike "relied on the *Carlay* case and" in the third line of the first full paragraph.

We make the following additional findings of fact:

In the course and conduct of its business, Pay'n Save has caused X–11 advertisements to be published in media of interstate circulation and has used means and mechanisms of interstate commerce in doing so (Admissions of Pay'n Save, Nos. 15 and 16b; Stipulations, Tr. 115–116, 377–380, 428–434; Answer of Pay'n Save, ¶6).

In the course and conduct of their business, Porter & Dietsch, Inc. and William H. Fraser cause advertisements for X–11 to be published in media of interstate circulation (Answer, ¶6, p. 7). They have used and continue to use means and mechanisms of interstate commerce in doing so (Admission No. 16a).

In the course and conduct of their business, Kelly Ketting Furth and Joseph Furth cause advertisements for X–11 to be published in media of interstate circulation (Answer, ¶6, p. 7). In doing so, they have used and continue to use means and mechanisms of interstate commerce (Admission No. 16c).

IN THE MATTER OF

FRUEHAUF CORPORATION

Docket 8972. Interlocutory Order, Dec. 21, 1977

Order requiring filing of memoranda pertaining to the issue of appropriate relief.

ORDER REQUIRING MEMORANDA ON ISSUE OF RELIEF

The Commission has taken this matter under advisement upon the appeal of respondent's counsel from the initial decision of the administrative law judge. The Commission has as yet made no determination as to liability. The Commission notes, however, that respondent has suggested in its brief that assuming *arguendo* that a violation of law is found, the Commission should consider requiring less than total divestiture of the acquired company, Kelsey-Hayes.

The question of appropriate relief in a matter is one which should ordinarily be addressed as part of the trial on the merits, so as to minimize the delay in obtaining such relief if a violation should be found. This is especially so where the extent of any violation which may ultimately be found is clear in advance of a finding of such violation. In this matter, for example, any violation found must be predicated upon Fruehauf's acquisition of Kelsey-Hayes' manufacturing capacity in one or two markets, heavy-duty wheels and/or antiskid braking devices. Accordingly the parties should be able to specify in advance of any ultimate finding of liability the contours of a remedy involving partial divestiture. [*Compare Warner-Lambert Co.*, 88 F.T.C. 503 (1976) wherein the ultimate finding of violation was predicated upon only a small fraction of the submarkets in which violations were initially alleged.]

In order to consider respondent's contention that partial divestiture would be appropriate assuming a violation is found, without, however, prolonging the time necessary for resolution of this matter, the Commission will order the parties to file supplemental memoranda on the question of an appropriate partial divestiture. The memoranda should not introduce new evidence but should cite relevant evidence already of record. They should discuss, *inter alia*, (1) the percentage of Kelsey-Hayes' assets and sales accounted for by its manufacturing capacity in the relevant markets and (2) the divisibility and independent viability of the assets which would be subject to any order of partial divestiture. Both parties shall also submit a proposed form of order which they believe suitable to effect a partial divestiture if such should be ordered. Submission of such an order, is, of course, without prejudice to the contention of respondent

that no violation has occurred and of complaint counsel that full divestiture is the appropriate remedy.[1]

Each side shall have 30 days from the date of receipt of service to submit its initial memorandum, and thereafter shall have 15 days from the date of receipt of the other side's memorandum within which to submit a reply.

Therefore, *it is ordered*, That within 30 days from the date of service of this order, each party shall file with the Commission a memorandum pertaining to the issue of appropriate relief in this matter, as described hereinabove. Thereafter, each party, within fifteen days after receipt of the memorandum of the other may file with the Commission a reply thereto.

[1] In issuing this order we have taken into account the contention of complaint counsel that a presumption should favor total divestiture in merger cases, because the acquired entity is more likely to prove viable upon divestiture (having proven viable before its acquisition) than some arbitrarily created sub-entity with no prior market history. We believe this argument is correct, and that the burden rests with respondent to demonstrate that a remedy other than full divestiture would adequately redress any violation which is found. However, complaint counsel when preparing their memorandum should assume, *arguendo*, that some partial divestiture may be deemed appropriate, and discuss what form it should take.

IN THE MATTER OF

BLOCK DRUG COMPANY, INC., ET AL.

ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 9050. Complaint, July 29, 1975 — Final Order, Dec. 21, 1977

This order, among other things, requires a Jersey City, N.J. manufacturer and distributor of denture adhesives and denture cleansers to cease misrepresenting the effectiveness of its products and to cease making unsubstantiated performance claims.

Appearances

For the Commission: *Melvin H. Orlans* and *Mark A. Heller.*

For the respondents: *James M. Nicholson, Robert E. Liedquist* and *Edward A. Geltman, Nicholson & Carter,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Block Drug Company, Inc., a corporation, and Grey Advertising, Inc., a corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Block Drug Company, Inc. is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive office and principal place of business located at 257 Cornelison Ave., Jersey City, New Jersey.

Respondent Grey Advertising, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 777 Third Ave., New York, New York.

PAR. 2. Respondent Block Drug Co., Inc. is now, and for some time last past has been, engaged in the manufacture, distribution, sale and advertising of various products, including denture adhesives and denture cleansers, which are drugs, devices and/or cosmetics within the meaning of the Federal Trade Commission Act. [2]

Respondent Grey Advertising, Inc. is now, and for some time last past has been, an advertising agency of respondent Block Drug Co.,

Inc., and now and for some time last past has prepared and placed for publication and caused the dissemination of advertising referred to herein, to promote the sale of various products of respondent Block Drug Co., Inc., including denture adhesives and denture cleansers.

PAR. 3. Respondent Block Drug Co., Inc. causes the said products, when sold, to be transported from its place of business in various States of the United States to purchasers located in various other States of the United States and in the District of Columbia. Respondent Block Drug Co., Inc. maintains, and at all times mentioned herein has maintained, a course of trade in said products in commerce. The volume of business in such commerce has been and is substantial.

PAR. 4. In the course and conduct of their said businesses, respondents Block Drug Co., Inc. and Grey Advertising, Inc. have disseminated and caused the dissemination of advertisements concerning the aforementioned products, including denture adhesives and denture cleansers, in or affecting commerce by means of advertisements printed in magazines and/or newspapers distributed by the mail and across state lines and transmitted by television stations located in various States of the United States and in the District of Columbia, having sufficient power to carry such broadcasts across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said products, including denture adhesives and denture cleansers.

PAR. 5. Among the advertisements so disseminated or caused to be disseminated by respondents are the advertisements attached as Exhibits A through D.

PAR. 6. Exhibits A, B and C hereto and others substantially similar thereto (hereinafter referred to as the "denture adhesive advertisements") represent that:

1. Users of Poli-Grip or Super Poli-Grip denture adhesive, regardless of their particular denture holding problems, can eat each of a group of so-called "problem" foods (including, for example, apples, peanuts, carrots, steak, corn-on-the-cob, celery, thick sandwiches, fried chicken and caramels) without embarrassment or discomfort. [3]

2. After the use of Poli-Grip or Super Poli-Grip, dentures will hold in place for denture wearers, regardless of particular denture holding problems, when the wearer eats each of the aforementioned "problem" foods.

PAR. 7. In truth and in fact:

1. Users of Poli-Grip or Super Poli-Grip denture adhesive cannot eat each of the aforementioned "problem" foods without embarrass-

ment or discomfort and without regard to particular denture holding problems.

2. After the use of Poli-Grip or Super Poli-Grip, dentures will not hold in place for denture wearers, regardless of particular denture holding problems, when the wearer eats each of the aforementioned "problem" foods.

Therefore, the denture adhesive advertisements were, and are, deceptive and/or unfair.

PAR. 8. Exhibit D hereto and others substantially similar thereto (hereinafter referred to as the "denture cleanser advertisements") represent that users of New Extra Effervescent Polident denture cleanser will see a visible and significant improvement in the cleanliness of their dentures relative to results they would obtain through the use of Extra Strength Efferdent, a competitive product.

PAR. 9. In truth and in fact, at the time respondents made the representations as alleged in Paragraphs Six and Eight, respondents did not possess and rely upon a reasonable basis for making said representations. Therefore, the denture adhesive advertisements and the denture cleanser advertisements were, and are, unfair and/or deceptive.

PAR. 10. The denture adhesive advertisements and the denture cleanser advertisements represent, directly or by implication, that respondents had a reasonable basis for making, at the time they were made, the representations as alleged in Paragraphs Six and Eight. [4]

PAR. 11. In truth and in fact, at the time respondents made the representations as alleged in Paragraph Ten, respondents had no reasonable basis for making the representations as alleged in Paragraphs Six and Eight. Therefore, the denture adhesive advertisements and the denture cleanser advertisements were, and are deceptive and/or unfair.

PAR. 12. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent Block Drug Company, Inc. has been and now is in substantial competition in commerce with corporations, firms, and individuals engaged in the sale and distribution of denture adhesives and denture cleansers of the same general kind and nature as those sold by said respondent.

In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent Grey Advertising, Inc. has been, and now is, in substantial competition in commerce with other advertising agencies.

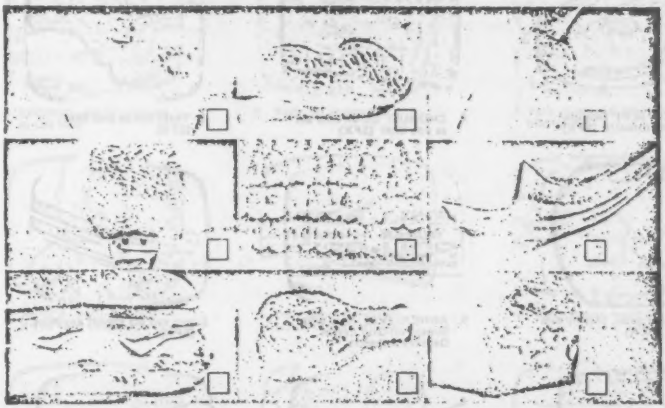
PAR. 13. The use by respondents of the aforesaid unfair and/or deceptive statements, representations and practices has had, and

now has, the capacity and tendency to mislead members of the consuming public into the purchase of substantial quantities of denture adhesives and denture cleansers manufactured by respondent Block Drug Co., Inc.

PAR. 14. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair or deceptive acts or practices in or affecting commerce and unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, and false advertisements disseminated by United States mails, and in commerce, in violation of Section 12 of the Federal Trade Commission Act.

Commissioners Thompson and Nye dissenting.

Denture wearers, check the foods you can eat without worry.



Check Poli-Grip and take a good healthy bite.

Millions of Americans who wear dentures depend on Poli-Grip to help them eat the foods they love without embarrassment or discomfort. Poli-Grip's exclusive holding formula helps keep dentures in place for hours. And for extremely hard-to-hold dentures — or during the period of adjustment to new dentures — there's Super Poli-Grip, the extra-holding formula that lets you eat many foods you worried about before.

No matter what your denture holding problem, Poli-Grip helps you eat — almost anything your heart desires.

Poli-Grip — America's number one cream denture adhesive.

Advertised in Reader's Digest - May, 1974

(Preprint for Identification Only)

Block Drug-Poli-Grip Exhibit

EXHIBIT A Date: 10-29-74

Block Drug Company
257 Cornelison Avenue, Jersey City, New Jersey

PRODUCT: POLI-GRIP
TITLE: "[redacted] BITE" II

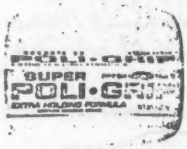
LENGTH: 30 SEC.
CODE NO.: BDSP4020

1. ANNCR: (VO) Denture Wearers, listen!!!! (SFX)

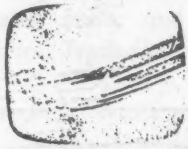
2. CHORUS: Go on now eat as you like! (SFX)

3. Yeah! Eat as you like! (SFX)

4. Take your good, healthy bite of life! (SFX)



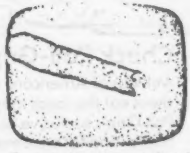
5. ANNCR: (VO) Now with Super Poli-Grip Cream Denture Adhesive



6. you can eat almost anything. (SFX)

7. Its strong-holding, long-holding plastic formula

8. helps keep even hard-to-hold dentures in place



9. so problem foods aren't such a problem. (SFX)

10. Super Poli-Grip with plastic, or regular Poli-Grip.

11. CHORUS RETURNS: Take a good healthy bite of life!

12. (SFX: CHOMP)

EXHIBIT B

Block Drug--Polygrip Exhibit
File No. [illegible]

Block Drug Company
257 Cornelison Avenue, Jersey City, New Jersey

PRODUCT: POLI-GRIP
TITLE: "GOOD EATING" II

LENGTH: 30 SEC.
CODE NO.: BDSP4019

1. CHORUS: Go on now eat as you like!

2. Yeah, eat as you like.

3. Take your good, healthy bite of life!

4. ANNCR: (VO) So what if you wear dentures?

5. Now, super Poli-Grip's plastic cream formula

6. holds strong, holds long,

7. helps keep even hard-to-hold dentures in place,

8. so you can eat almost anything.

9. Super Poli-Grip with plastic, or regular Poli-Grip.

10. Go on, eat as you like!

11. REPRISE: Take a good, healthy bite of life!

Block Drug--Pl'grip Exhibit
File No: [illegible]
Date: 10-29-74

EXHIBIT C

Block Drug Company
257 Cornelison Avenue, Jersey City, New Jersey

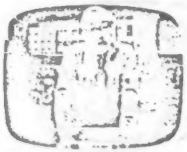
PRODUCT: POLIDENT TABLETS
TITLE: "STORE OWNER"

LENGTH: 30 SECONDS
CODE NO.: BDPT3173

1. HENRY: If just yesterday, you asked me:

2. "Henry, which denture cleanser should I buy?"

3. What could I tell you?



4. One turns blue, one turns green. They both work.

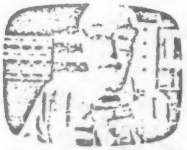
5. Well today! Today there's a new one.

6. New Extra Effervescent Polident Tablets.

7. Extra.

8. That means 50% more effervescent cleaning action than it ever had before.

9. ....To work better on stains and odors.



10. But don't just take my word. Take home some New Polident.

11. You'll see the difference.

Block Drug Company
Date 10-29-74

EXHIBIT D

9327

DISSENTING STATEMENT OF COMMISSIONER NYE

JULY 29, 1975

I agree that staff has presented the Commission with reason to believe that Block Drug Company did not have sufficient substantiation for its advertising of Poli-Grip. I am concerned, however, that the Commission has decided to proceed against Block without first investigating the substantiation its competitors have for their denture-adhesive claims, which appear equally unsupportable. Although the law does not require the Commission to proceed against all alleged malefactors simultaneously, we should when we can, and we can in this case. I would therefore complete our investigation and, thereafter, file all law enforcement actions warranted at the same time.

DISSENTING STATEMENT OF COMMISSIONER MAYO J. THOMPSON

JULY 29, 1975

It is with concern that I note today that the Commission has, with this complaint, started down the road toward the prosecution of another "Dry Ban" case.

The majority has voted to issue a complaint alleging, among other things, that certain Block Drug print advertisements falsely represented that use of Block's Poli-Grip or Super Poli-Grip denture adhesive would allow denture wearers, regardless of their denture-holding problems, to eat "problem foods" such as apples, corn-on-the-cob, and candy caramels without embarrassment or discomfort. The complaint also includes a charge that Block had no "reasonable basis" for claims that its denture cleanser New Extra Effervescent Polident would clean dentures significantly better than the Warner-Lambert product Extra Strength Efferdent.

I do not challenge my fellow Commissioners' decision that they had the requisite statutory "reason to believe" that a significant number of consumers perceived from the challenged advertisements the claims which the complaint alleges were made, nor do I challenge their decision that they had "reason to believe" the claims were false or unsubstantiated.

But I cannot agree that this proceeding is in the "public interest," as I am required by Section 5 of the Federal Trade Commission Act to determine before voting a complaint against any respondent.

As I stated in my opinion concurring in the dismissal of the complaint against the Bristol-Myers Company and its advertising agency, Ogilvy & Mather, Inc., for their advertisements for the

underarm deodorant Dry Ban, Dkt. 8897 (April 22, 1975) [85 F.T.C. 688], I do not believe it is in the public interest for the Commission to challenge advertising claims the truth or falsity of which the average consumer can judge through use of one rather [2] inexpensive jar, tube, or box of the advertised product. As I stated in the Dry Ban case, even if one believes that deceptive advertising claims can convince the consumer to purchase a product he would not otherwise have purchased, if the consumer can judge the truth or falsity of the claim himself, he is not likely to repeat the purchase if he has been misled. Surely it is repeat sales that a company needs in order to survive, and if a company attempts to deceive the public with claims the consumer can quickly determine to be false, the company will not enjoy repeat sales and may even lose market share.

I believe these principles apply quite properly to this case. The costs of one tube or box of the products involved in this case are not high in absolute amounts, and they surely make up a negligible percentage of any purchaser's budget. Further, I believe denture wearers should be able to judge the efficacy of these products quite easily. Their experience should enable them to judge whether Polident really does clean 50 percent better than the other leading brand. And as for Block's denture adhesives, it is inconceivable to me that any denture wearer who applied Poli-Grip or Super Poli-Grip and bit into a red apple and then saw his dentures smiling back at him would ever purchase the Gripper again.

Some might argue, though, that persons who would be likely to purchase denture adhesives, for example, are in general elderly and on fixed incomes, and that they cannot really afford even the cost of one tube of an ineffective denture adhesive. But this argument assumes that absent the false claims these persons would not purchase denture adhesives at all. I find this difficult to believe.

Information in this file shows that experts generally agree that persons owning well-fitting dentures probably do not need to use denture adhesives, but that the adhesives probably provide some aid to those with dentures that do not fit properly. I suspect that most persons owning ill-fitting dentures are aware that the adhesives help them to some extent and that they will continue buying them so long as they are advertised and sold. Seeing nothing in this file to indicate that Block Drug's adhesives are either less effective or more expensive than other products in this market, I am not convinced that singling out Block Drug Company and challenging certain specific advertising claims is in the public interest.

INITIAL DECISION* BY MILES J. BROWN, ADMINISTRATIVE LAW JUDGE

OCTOBER 4, 1977

PRELIMINARY STATEMENT

The Federal Trade Commission issued its complaint in this matter on July 29, 1975 (mailed August 21, 1975), charging Block Drug Company, Inc. ("Block")[1] with unfair or deceptive acts or practices in or affecting commerce and unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), and false advertisements disseminated by U.S. mail and in commerce, in violation of Section 12 of the Federal Trade Commission Act (15 U.S.C. 52). [2]

In the complaint it was alleged that Block, through certain particular advertisements, had falsely represented that —

1. Users of Poli-Grip or Super Poli-Grip denture adhesive, regardless of their particular denture holding problems, can eat each of a group of so-called "problem" foods (including for example, apples, peanuts, carrots, steak, corn-on-the-cob, celery, thick sandwiches, fried chicken and caramels) without embarrassment or discomfort, and

2. After the use of Poli-Grip or Super Poli-Grip, dentures will hold in place for denture wearers, regardless of particular denture holding problems, when the wearer eats each of the aforementioned "problem" foods.

It was also alleged that in certain advertisements respondents had represented that users of New Extra Effervescent Polident denture cleanser will see a visible and significant improvement in the cleanliness of their dentures relative to results they would obtain through use of Extra Strength Efferdent, a competitive product.

It was further alleged that, at the time it disseminated the challenged advertisements, Block did not possess or rely upon a reasonable basis for making the alleged representations, which constituted a violation of the Federal Trade Commission Act. In addition, it was alleged that Block falsely represented that it had a reasonable basis for making such representations.

In its answer, Block denied the substantive allegations of the complaint. By way of affirmative defenses, it challenged the validity

* Reported as modified by the Commission's Final Order of December 21, 1977.

[1] The complaint also named Grey Advertising, Inc., a corporation ("Grey"). On July 13, 1977, the Administrative Law Judge certified to the Commission a joint motion of Grey and complaint counsel to withdraw the matter from adjudication as to Grey to consider an agreement containing a consent order to cease and desist. By order dated July 22, 1977, the Commission withdrew the matter from adjudication as to Grey.

of the Commission's "reasonable basis" doctrine on several grounds, and asserted that the Commission's proceeding against it was arbitrary and not in the public interest.

On February 3, 1976, Administrative Law Judge Harry R. Hinkes[2] certified to the Commission Block's motion to dismiss, or in the alternative to suspend, proceedings in [3] this matter because on November 11, 1975 the Commission proposed a Trade Regulation Rule Proceeding that would govern Over-the-Counter ("OTC") drug advertising including representations concerning denture products. On March 22, 1976, the Commission denied the motion to terminate or suspend the proceeding.

Thereafter the parties initiated their discovery. Complaint counsel filed their proposed exhibit and witness lists on October 15, 1976, and their trial brief on November 1, 1976. Respondents filed their proposed exhibit and witness lists on November 15, 1976. Adjudicative hearings were scheduled to commence February 21, 1977.

On January 12, 1977, upon joint motion of counsel, the initial hearing date was rescheduled for March 21, 1977. Respondent's trial brief was filed February 4, 1977.

At a prehearing conference held March 8, 1977, complaint counsel announced their plan to move to amend the complaint in a significant respect and moved for postponement of the adjudicative hearings. Respondents opposed the motion for postponement and the Administrative Law Judge denied the motion (Tr. 22–23; see also order dated March 15, 1977). Complaint counsel's motion to amend was certified to the Commission.[3] On March 18, 1977, the Commission declined to upset the Administrative Law Judge's ruling that the adjudicative hearings would not be stayed.

Hearings commenced March 21, 1977, at which time complaint counsel's documents were offered into evidence and rulings were made on objections thereto. No witnesses were called and the hearings were adjourned until March 28, 1977. On March 28, 1977, counsel filed a joint motion to continue the hearing until April 18, 1977, to permit them an opportunity to expedite the ultimate resolution of this matter. The joint motion was granted.

A further continuance was granted, after counsel advised the Administrative Law Judge that they intended to submit this matter on a stipulated record and an agreed order (see order dated April 15, 1977). [4]

On June 6, 1977, respondent Grey and complaint counsel filed

[2] The matter was reassigned to the undersigned on October 22, 1976.

[3] By order dated June 21, 1977, the Commission granted complaint counsel's unopposed motion to withdraw the motion to amend the complaint.

their joint motion to withdraw the matter from adjudication as to Grey (see footnote 1, *supra*). On July 6, 1977, hearings were held for completion of the record as to Block at which time the parties filed the affidavits of their expert witnesses (CXs 93–96; RXs 1–4)[4] and a stipulation (CX 97). In addition, certain documents received into the record at the March 21, 1977, hearing were withdrawn (CXs 14–21, 27–35, 41, 47, 50, 53, 55, 60–61, 66). On August 2, 1977, the Administrative Law Judge issued his order receiving substitute Affidavit-Exhibit CX 94 A–H into evidence, and closing the record for the receipt of evidence.

The evidentiary facts are not the subject of significant dispute. The affidavits of the Commission's expert witnesses and respondent's employees and expert witness were received into the record without objection and both parties have recommended an identical order to be issued if the findings of fact in this Initial Decision are substantially similar to the findings of fact proposed by complaint counsel. However, it should be emphasized that this proceeding is not a consent order proceeding. The Administrative Law Judge and the Commission may, on the evidentiary record, issue any order deemed appropriate. The dilemma posed by the situation that prevailed in *National Biscuit Co.*, Docket No. 5013, will not be present. See *National Biscuit Company* v. *Federal Trade Commission*, 400 F.2d 270 (5th Cir. 1968); *Nabisco, Inc.* v. *Federal Trade Commission*, 459 F.2d 1023 (5th Cir. 1972). Of course, Block and complaint counsel reserve the right to appeal any order issued in this matter that does not conform substantially to the agreed-upon order.

Any motions appearing on the record not heretofore or hereby specifically ruled upon either directly or by the necessary effect of the conclusions of this Initial Decision are hereby denied.

The proposed findings and conclusions submitted by counsel supporting the complaint ("CXCPF") and counsel for Block ("Resp. PF") have been given careful consideration and [5] to the extent not adopted by this decision, in the form proposed or in substance, are rejected as not supported by the evidence or as immaterial.

Having reviewed the entire record in this proceeding, together with the pleadings, the proposed findings, and conclusions, I make the following findings of fact based on the record considered as a whole:

[4] One of the affidavits (CX 94) had not as of that date been executed properly.

FINDINGS AS TO THE FACTS

1. Respondent Block is a New Jersey corporation with its principal place of business located at 257 Cornelison Ave., Jersey City, New Jersey (Ans. Par. 1; Resp. PF 1).

2. Block does now, and at all times relevant hereto did, engage in the manufacture, distribution, sale and advertising of denture adhesive and denture cleansers. These products are transported from Block's place of business in various States of the United States to purchasers located in various other States of the United States and in the District of Columbia (Compl. Pars. 2, 3; Ans. Pars. 2, 3; Resp. PF 2).

3. Block authorized the publication of numerous advertisements, including the advertisements challenged in the complaint, in publications of interstate circulation, and by national network television (CXs 23, 24, 26). Dissemination of such advertisements has been substantial. Approximately $7.4 million per year for the last three years has been expended for the purpose of selling its denture adhesive products Poli-Grip and Super Poli-Grip and its denture cleanser product New Effervescent Polident (CX 97d (Stip.)).

4. Block maintains, and at all times relevant to this proceeding has maintained, a substantial course of trade in commerce in the said denture adhesive products and denture cleanser product as "commerce" is defined in the Federal Trade Commission Act and the challenged acts and practices are "in commerce" and "affect commerce" as such terms are defined in said Act (see CX 97a, c (Stip.)).

5. Block is in competition with corporations engaged in the sale and distribution of denture cleansers and adhesives (Ans. Par. 12; see Resp. PF 5). [6]

6. Physical Exhibit B (see storyboard CX 10) is typical of the challenged denture adhesive advertisements that were included in Block's advertising campaign entitled "Bite of Life" (see 97d (Stip.)). This advertisement is a 30-second television advertisement entitled "Good Eating II" and may be described as follows:

The commercial opens by showing several people heartily enjoying, and eating at, an outdoor picnic. The audio chorus sings: "Go on now eat as you like" (Frame 1). A close-up is then shown of a male picnicker eating his fried chicken with gusto and confidence. The chorus simultaneously sings: "Yeah, eat as you like. Take your good healthy bite of life" (Frames 2, 3). The camera then shifts to a female picnicker who is enthusiastically eating corn-on-the-cob. The audio portion becomes an announcer's voice, which notes "So what if you

wear dentures" (Frame 4). The video immediately changes to a box of Super Poli-Grip on the table next to an ear of corn while the announcer's voice states that "Now, Super Poli-Grip's plastic cream formula (Frame 5) holds strong, holds long (Frame 6) helps keep even hard to hold dentures in place" (Frame 7). Toward the latter part of the announcer's statement, the scene shifts back to a close-up of another female eating a spare-rib (Frame 6). The box of Super Poli-Grip is again shown on the table, this time surrounded by a plate of spare-ribs as well as an ear of corn (Frame 7). The scene then shifts, this time to a close-up of a man in a business suit biting a thick sandwich. The announcer continues: "So you can eat almost anything" (Frame 8). Boxes of Poli-Grip and Super Poli-Grip are then shown on the table, surrounded by an ear of corn, a plate of spare-ribs, and a thick, "hero"-type sandwich. The announcer states: "Super Poli-Grip with plastic, or regular Poli-Grip" (Frame 9). The scene then returns to the picnic with the people identified as denture wearers eating several different foods with enjoyment and without difficulty, embarrassment or apparent discomfort. The chorus sings "Go on, eat as you like. [Frame 10] Take a good healthy bite of life!" (Frame 11). At the last line of the song, the camera shows a man biting an apple, on the upper portion of the screen; the lower portion contains the Poli-Grip and Super Poli-Grip boxes, and in the middle of the screen the phrase "take a good healthy bite of life" is superimposed. [7]

7. Physical Exhibit A (see storyboard CX 9), entitled "Food Bite", contains substantially the same audio material as the "Good Eating" commercial (see finding 6, *supra*), but contains a video portion featuring the simulated biting of corn-on-the-cob, a piece of chicken, an apple (twice), a piece of celery and a carrot. Each food item first is shown whole and then with a bite taken out of it. The "bite" sequence is accompanied by a distinct audio "chomp."

8. Block conducted so-called "copy tests" of the advertisements "Food Bite" and "Good Eating" (CXs 59, 64). These "copy tests" involved showing the advertisements to a number of consumers and asking them questions about them.

The results reported in CX 59(s) (1974) under the category "eating benefits" may be summarized as follows:

	Percent (of 150 viewers) who perceived message	
Message Perceived	"Food Bite"	"Good Eating"
Can eat difficult foods/problem foods	42	39

Can eat anything	24	34

Similar results reported in CX 64(j) (1975) were as follows, although the test involved 126 viewers.

Can eat difficult foods/problem foods	39	75
Can eat anything	51	46

9. By and through the use of the challenged denture adhesive advertisements (CXs 6–12); Physical Exhibits A, B, D), respondent Block represented that —

(a.) Users of Poli-Grip or Super Poli-Grip denture adhesive, regardless of their particular denture holding problems, can eat each of a group of so-called "problem" foods (including, for example, apples, peanuts, carrots, steak, corn-on-the-cob, celery, thick sandwiches, fried chicken and caramels) without embarrassment or discomfort; and

(b.) After the use of Poli-Grip or Super Poli-Grip, dentures will hold in place for denture wearers, regardless of particular denture holding problems, when the wearer eats each of the aforementioned "problem" foods. [8]

10. Dentures are man-made replacements for natural teeth. Dentures are usually constructed out of porcelain or acrylic, and are intended cosmetically to look like natural teeth. As replacements for natural teeth, dentures enable denture wearers to recover but a small portion of the function of the natural teeth which they no longer possess (CX 94b (Kapur)).

Dentures are constructed so that the forces involved in eating, or otherwise in using the dentures, are evenly distributed over a maximum area. This makes functions such as biting, which concentrates the force in one area, difficult to perform. In addition, the front teeth in many dentures are placed against the lips to keep the lips from collapsing without support. Although this placement maximizes aesthetic appearance, it minimizes the functional utility of the front teeth. The fundamental principles incorporated into denture construction make it difficult to bite or tear food with the front teeth (CX 94d (Kapur); see CX 93c (Atwood); 95c(Kratochvil)).

There is a wide variation among the denture wearing population in terms of the ability to eat with dentures. Such factors as the physical condition of the denture wearer's support area including mouth tissue and bone, the dimension and fit of the denture, the person's ability to adjust to the use of dentures and the wearer's tolerance to discomfort and pain, vary widely from individual to

individual. In addition various types of foods will present varying degrees of problems to different people.

An apple is recognized as being hard to bite, but not hard to chew. On the other hand, sticky candy is hard to chew. Certain fibrous foods like celery are difficult to manage for denture wearers (CX 94d–e (Kapur); CX 93d (Atwood); 95d (Kratochvil)).

A denture adhesive is a sticky substance generally either karaya gum, a natural substance, or an artificial plastic (CX 94b (Kapur); 95b (Kratochvil)).

Poli-Grip's active ingredient is gum karaya. This ingredient has been used in denture adhesive products for over 50 years. Super Poli-Grip's active ingredients are synthetic, non-toxic water soluble substances with excellent adhesive qualities (RX 3 (Fischer); RX 2 (Rosenthal)). [9]

The denture adhesive is applied to the base of the denture in as even a layer as possible. When the denture is then placed in the mouth, the adhesive acts as a sort of temporary glue and creates an adhesive bond (CX 94b–c (Kapur)).

A denture adhesive aids in remedying only one of the various factors that affect a wearer's denture performance, namely retention. Unless this factor represents the totality of the wearer's problem, an adhesive will not solve the biting or chewing problems experienced by the wearer (CX 93b (Atwood); 95b, c (Kratochvil)).

Accordingly, the very manner in which many dentures are constructed results in the situation where the front teeth are virtually useless for biting and only serve cosmetic purposes. The back teeth then become the surface for pulverizing food. Because of the limitation in denture functions, many denture wearers cannot eat hard-to-bite foods such as apples and corn-on-the-cob, with or without the use of an adhesive (CX 93c (Atwood)). For many of them dislodgement of the dentures will occur if they attempt to eat such foods, with or without the use of an adhesive (CX 93d (Atwood); 95d(Kratochvil)).

11. Respondent's claims that users of denture adhesives, Poli-Grip and Super Poli-Grip, regardless of their particular denture holding problems, can eat each of a group of so-called "problem foods" (including, for example, apples, peanuts, carrots, steak, corn-on-the-cob, celery, thick sandwiches, fried chicken and caramels) without embarrassment or discomfort, and that, after the use of a denture adhesive Poli-Grip and Super Poli-Grip, dentures will hold in place for denture wearers, regardless of their particular denture holding problems, when the wearer eats each of the aforementioned

"problem" foods, are false (CX 93b (Atwood); CX 94c (Kapur); CX 95b (Kratochvil)).

12. The limited extent to which denture adhesives can serve to ameleorate the usual problems that denture wearers' encounter in using dentures is well known among the professional ranks of those specializing in all aspects of the fitting and functioning of dentures and in the use of denture adhesives ("prosthodonics")(CX 95 (Kratochvil); (CX 94 (Kapur); CX 93 (Atwood)). Block's employees, [10] including Murray Rosenthal, Block's Vice-President, Research and Development, on the basis of such general knowledge as well as certain tests that had been conducted in the use of such products since 1962, were of the opinion that Poli-Grip and Super Poli-Grip would help *many* denture wearers eat various types of foods where the denture wearers' primary problem was retention (RX 2 (Rosenthal)). No representative of Block has stated that they had any reason to believe that Poli-Grip or Super Poli-Grip would accomplish the results promised in the advertising claims that Block made in the challenged commericals as alleged in the complaint and found in this decision.

13. Accordingly, Block, at the time it caused the dissemination of the challenged advertisements did not possess or rely upon a reasonable basis for the claims made therein. Failure to have a reasonable basis for such claims is an unfair practice.

14. In making the claims contained in the challenged advertisements, Block represented, directly or indirectly, that it had substantiation for said claims.

15. As found above (finding 13), Block did not have a reasonable basis for the said claims and its representation that it did, was false and misleading.

16. The challenged denture cleanser television advertisement (CX 13; Physical Exhibit C), entitled "Store Owner," is a 30-second commercial and portrays a man named Henry, standing behind a store counter, who offers the following advice:

Frame 1 If just yesterday, you asked me:

Frame 2 "Henry, which denture cleanser should I buy?"

Frame 3 What could I tell you?

Frame 4 One turns blue, one turns green. They both work.

Frame 5 Well today! Today there's a new one.

Frame 6 New Extra Effervescent Polident Tablets.

Frame 7 Extra

Frame 8 That means 50 percent more effervescent cleaning action than it ever had before.

Frame 9 To work better on stains and odors. [11]

Frame 10 But don't just take my word. Take home some New Polident.

Frame 11 You'll see the difference.

In the video portion of the commercial Frames 8 and 9 demonstrate the "effervescence" action of the tablet in what appears to be a glass of water.

17. The purpose of the aforesaid commercial was to introduce New Extra Effervescent Polident to supersede old Polident, its predecessor product (CX 97c (Stip.)). The phrase "one turns blue (CX 13 (Frame 4)), is a reference to Extra Strength Efferdent, a competitive product marketed by Warner-Lambert Co. (CX 97a,c (Stip.)). The phrase "one turns green" (CX 13 (Frame 4)) is a reference to the old Polident product (CX 97a, b, c, (Stip.)).

18. By and through the use of the challenged denture cleanser advertisement respondent Block has represented that users of New Extra Effervescent Polident denture cleanser will see a visible and significant improvement in the cleanliness of their dentures relative to results they would obtain through the use of Extra Strength Efferdent, a competitive product.

19. The material submitted to the Commission in response to a Commission order to substantiate the advertising claim for New Extra Effervescent Polident did not consist of reliable scientific evidence upon which Block could form a "reasonable basis" for such a claim. For the most part the tests submitted related to comparisons between New Extra Effervescent Polident and the prior Polident product. Where comparisons between New Extra Effervescent Polident and Efferdent were attempted the results showed that there was no appreciable difference in the visible appearance as to whiteness after using the various denture cleansers (see CX 69z170; CX 96b, e, f, g; see also CX 37 (*in camera*)).

20. Accordingly, Block, at the time it caused the dissemination of the challenged advertisement did not possess or rely upon a reasonable basis for the claim made therein. Failure to have a reasonable basis for such a claim is an unfair practice.

21. In making the claim contained in the challenged advertise-

ment, Block represented, directly or indirectly, that it had substantiation for said claim. [12]

22. As found above (finding 20), Block did not have a reasonable basis for such a claim and its representation that it did, was false and misleading.

DISCUSSION

The principal issue at this posture of the proceeding is whether Block, by the challenged advertisements, made the representations as alleged in the complaint. It is Block's position that it did not make such claims, and that the claims it did make were not only true, but were substantiated.

It is well settled that the meaning of an advertisement is a question of fact and that such meaning may be determined by an examination of the advertisement itself. *Carter Products, Inc.* v. *Federal Trade Commission,* 323 F.2d 523 (5th Cir. 1963); *J.B. Williams Co., Inc.* v. *Federal Trade Commission,* 381 F.2d 884 (6th Cir. 1967). Advertisements may have more than one meaning. Implications and inferences may be made from statements actually made as well as from information not set forth therein, if the excluded facts are material *i.e.,* are facts considered to be material to the consumer's choice whether to purchase the product advertised. *Chrysler Corp.* v. *Federal Trade Commission,* D.C. Cir. (decided July 6, 1977, slip opinion at p. 12); *Federal Trade Commission* v. *Colgate-Palmolive Co.,* 380 U.S. 374 (1965).

In my opinion it is clear that the challenged denture adhesive advertisements did make the claims alleged in the complaint. This determination has been made from carefully considering the advertisements, including the format and the emphasis placed on certain words and phrases contained therein. The so-called "Food Bite" commercial with its video and audio "chomp" sequences on various foods is a clear promise that Poli-Grip and Super Poli-Grip will enable any denture wearer to eat those same foods without any difficulty and without concern as to retention problems.

Block contends that the advertisement represented only that Poli-Grip and Super Poli-Grip will help many denture wearers eat various types of food (see Resp. PF pp. 5–6). Clearly, the message conveyed by these commercials is not such a qualified representation as to the efficacy of Block's denture adhesives. [13]

If there was any doubt as to the message conveyed by these denture adhesive advertisements, such doubt is dispelled by the results of the "copy tests", where a not insubstantial number of

persons sampled perceived the messages as representing eating benefits similar to the allegations of the complaint.

The material submitted by Block for purposes of substantiation goes to the claim that its denture adhesives will help many denture wearers eat various types of food. Block does not make an attempt to substantiate the broader claim actually made in the commercials. Indeed, the expert testimony, which is not controverted, demonstrates that many denture wearers cannot eat problem foods in the manner portrayed, whether or not they use a denture adhesive, and that the physical limitations on the use of dentures by many wearers would make substantiation of the broad claims impossible.

Block contends that it was the intended purpose of the "Store Owner" advertisement to communicate to denture wearers the superiority of the cleansing power of the new Polident formula as compared to its old product formula. In my opinion the advertisement claims much more. It includes the competing product (Efferdent) "the blue one" in the comparison and promises that the consumer will "see the difference." The important difference to the consumer would be the appearance of the dentures as to cleanliness.

There is no charge in this matter that the "Store Owner" commercial was false. The allegations of violations of the Federal Trade Commission Act are that Block had no substantiation for the claim actually made.

Although the material of record demonstrates that Block has done considerable testing with respect to its new formula Polident as compared to its old formula Polident, the testing of new Polident as compared to Efferdent, the competing product, was very limited, and the results were quite inconclusive as to the relative appearance of dentures cleansed by use of those two products. No substantiation which would constitute a reasonable basis for the claim made has been demonstrated. [14]

There is no longer any dispute in this proceeding as to whether it is an unfair practice in violation of Section 5 of the Federal Trade Commission Act to make a product claim without possessing and relying upon a reasonable basis for that claim at the time the product claim is made. The Commission's "reasonable basis" doctrine has been upheld by the circuit courts of appeals. See *Firestone Tire & Rubber Co.* v. *Federal Trade Commission,* 481 F.2d 246 (6th Cir. 1973); *Fedder Corp.* v. *Federal Trade Commission,* 529 F.2d 1398, 1400–1 (2d Cir. 1976).

Finally, there is the question as to whether the products in question come within the coverage of Section 12 of the Federal Trade Commission Act. Block, throughout this proceeding, has maintained

that its products are not "devices" within the meaning of the Act. Complaint counsel have not pressed this point in their proposed findings and it is deemed abandoned.

In any event, the issue does not appear to have any substantive importance in this matter.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over respondent Block and the acts and practices which are the subject matter of this proceeding.

2. Block, at all times relevant hereto, has been engaged in "commerce" within the meaning of Section 5 of the Federal Trade Commission Act, and has been and now is, in substantial competition, in commerce, with corporations, firms or individuals in the sale of denture adhesives, denture cleansers and other dental products.

3. The advertisements pertaining to denture adhesives and the statements and representations therein that are challenged in this proceeding are false, misleading and unsubstantiated. The advertisement pertaining to denture cleansers and the statements and representations therein challenged in this proceeding are unsubstantiated. Therefore, the challenged statements and representations were, and are either false, deceptive and/or unfair in material respects.

4. The use by the respondent of the aforesaid advertisements had and now have the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said advertisements and the statements and representations in connection therewith were and are true and/or substantiated. As a result, substantial trade has been and is being unfairly diverted to Block, from its competitors in the dental product market. [15]

5. The aforesaid acts and practices of Block, as charged in the complaint and as reflected in the record, were and are all to the prejudice and injury of the public and of Block's competitors and constituted, and now constitute, unfair and deceptive acts and practices "in commerce" and "affecting commerce" and are unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act.

6. This proceeding is in the public interest. The Commission so determined upon the assumption of jurisdiction through the issuance of the complaint. *American Airlines, Inc.* v. *North American Airlines, Inc.* 351 U.S. 79, 83 (1956). Nothing in the record or the findings requires a different result. See *Federal Trade Commission* v. *Klesner,* 280 U.S. 19 (1929).

7. No determination has been made in this proceeding as to whether the denture products subject to the complaint are "devices" within the meaning of Section 12 of the Federal Trade Commission Act.

REMEDY

Complaint counsel and respondent Block have submitted an agreed-to order, recommending that it be entered in the event the Administrative Law Judge finds the violations alleged in the complaint.

Upon review of the terms of the order, I am of the opinion that it satisfies the needs of this proceeding. It is reasonably related to the practices found to be unlawful and prohibits Block's use of those and similar practices in the future. It also provides that should any Trade Regulation Rule permit any practice prohibited by the recommended order, that such provision of the order shall "abate" upon final promulgation of such a Rule. This provision appears to be consistent with the ongoing Commission policy of reconciling the terms of outstanding orders with its Rules and Guides.

ORDER

It is ordered, That respondent Block Drug Company, Inc., and its officers, representatives, agents and employees directly or through any corporate or other device, in [16] connection with the advertising, offering for sale, sale or distribution of products, sold by the respondent in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Making any statements or representations directly or by implication concerning any performance or other characteristic or attribute of any dental product, except denture cleansers, without possessing and relying upon a reasonable basis for each such statement or representation at the time it is made.

2. Making any comparative statements or representations directly or by implication concerning any performance attribute of any competitor's denture cleanser product without possessing and relying upon a reasonable basis for each such statement or representation at the time it is made.

3. Misrepresenting in any manner the effectiveness of any denture adhesive product.

4. Representing, directly or by implication, that:

a. Every user of denture adhesives, regardless of his or her

particular denture holding problem, can eat any of a group of so-called "problem" foods (including, for example, apples, peanuts, carrots, steak, corn-on-the-cob, celery, thick sandwiches, fried chicken and caramels) without embarrassment or discomfort; and/or [17]

b. After the use of a denture adhesive, dentures will hold in place for every denture wearer, regardless of his or her particular denture holding problem, when the wearer eats any of the aforementioned "problem" foods.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondent notify the Commission at least 30 days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondent submit to the Commission, in writing, a compliance report detailing the manner and form in which it complied with this order. Such reports shall be submitted sixty (60) days after the entry of a final order and, thereafter, annually for two (2) years from the date of the first submission. [18]

In addition, any provision of this order shall abate when inconsistent with a final Federal Trade Commission trade regulation rule if the trade regulation rule specifically authorizes any claim prohibited herein.

It is further ordered, That the complaint, insofar as it charges Block with violation of Section 12 of the Federal Trade Commission Act, is dismissed.

FINAL ORDER

The administrative law judge filed his initial decision in this matter on October 4, 1977, and service of the initial decision was completed on October 28, 1977. No appeal from the initial decision has been filed, and the Commission has determined that the initial decision and order contained therein shall become the decision and order of the Commission, with the following minor changes:

Page 2, line 1, change "is" to "it."
Page 5, Finding 2, line 2, delete final "r" in "manufacturer."
Page 12, line 5, change "principle" to "principal."

Therefore, it is ordered, That the initial decision (as modified above) and order contained therein, shall become the decision and order of the Commission on the date of issuance of this order.

IN THE MATTER OF

CHRYSLER CORPORATION, ET AL.

Docket 9072. Interlocutory Order, Dec. 27, 1977

Order denying respondents' motion to dismiss complaint. Only in extraordinary circumstances, not shown in the instant case, will the Commission review a determination of public interest after a complaint has issued.

ORDER DENYING MOTION TO DISMISS

Respondents Chrysler Corporation and Chrysler Credit Corporation have moved to dismiss the complaint herein on the ground that the theory on which it rests should have been pursued by rulemaking rather than adjudication. Movants requested that, to the extent the Administrative Law Judge lacked authority to rule on this motion, it be certified to the Commission. By order of September 7, 1977,[1] Administrative Law Judge Parker certified a portion of the motion and denied the remainder.

As it comes to us,[2] the ground urged for dismissal is supported by two arguments: 1) that a rule would have industrywide application and would thus be more equitable and more effective; and 2) that adjudication is not the appropriate forum for the determination of preemption issues (to the extent they are presented). The resolution of the present motion, however, is controlled by our decision on the very similar motion in the companion *Ford Motor Co.* case.[3] There, the Commission noted that "[o]nly in the most extraordinary circumstances, not shown here, will the Commission review [the determination that a particular adjudicative proceeding is in the public interest] once a complaint has issued." Nothing presented here distinguishes the present motion from that in *Ford* in any way relevant to that standard. Accordingly,

It is ordered, That the motion to dismiss be, and it hereby is, denied.

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[1] Due to an unfortunate clerical lapse, this order was not transmitted to the Commissioner responsible until November 23.

[2] Insofar as the motion is based upon the argument that the complaint should be dismissed because it assertedly conflicts with state and federal statutes, the Administrative Law Judge correctly determined that he had authority to rule upon it, and did so. This argument, as such, is not before us.

[3] *Ford Motor Co., et al.,* Dkt. 9073, Order Denying Motion to Dismiss Complaint, issued May 25, 1976. See also our July 7, 1976 order, identically titled, in the third companion case, *General Motors Corporation et al.,* Dkt. 9074.

IN THE MATTER OF

AMERICAN HOME PRODUCTS CORPORATION, ET AL.

Docket 8918. Interlocutory Order, Dec. 28, 1977

Order denying application for review of administrative law judge's order denying request for certification of proceeding under Section 3.23(b) of the Commission's Rules of Practice. The Commission finds no basis for a finding of abuse of discretion and no basis for extraordinary review.

ORDER DENYING APPLICATION FOR REVIEW

Once again in this proceeding,[1] the Commission has before it an application for review of a ruling by the Administrative Law Judge filed in spite of his denial of requested certification under Rule Section 3.23(b). American Home Products Corporation ("AHP") urges that we find a clear abuse of discretion which will result in irreparable injury in Judge Hyun's orders of May 26 and September 20, 1977, respecting pre-trial exchanges of proposed exhibits, insofar as they require pre-trial disclosure of respondent's "proposed exhibits which contain data taken directly from the complaint counsel's exhibits but which may be used in or serve as the basis of cross-examination of opposing expert witnesses."[2]

At the threshold, we note that AHP rather exaggerates the scope of Judge Hyun's order, which explicitly does not extend to "documents or tabulations which respondents intend to use solely for the purpose of cross-examination in impeaching complaint counsel's witnesses without offering them as respondents' exhibits in support of their cases."[3] In any event, we find no basis in AHP's application for a finding of clear abuse of discretion in the Administrative Law Judge's rulings, and no basis for exercising extraordinary review thereof. Accordingly,

It is ordered, That the application be, and it hereby is, denied.

[1] See the Commission's orders of August 18, 1977, and September 10, 1974, similarly denying applications for review made over the Administrative Law Judge's refusal to certify under Rule Section 3.23(b).

[2] AHP's application, at page 3.

[3] Order Denying Respondent's Application for a Determination Permitting Interlocutory Review, issued October 6, 1977.

IN THE MATTER OF

UNIVERSAL FIGURE FORM OF YOUNGSTOWN, INCORPORATED, ET AL.

MODIFYING ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2317. Final Order, Nov. 15, 1972 — Modifying Order, Dec. 28, 1977

This order modifies a final order to cease and desist issued November 15, 1972, 37 FR 28281, 81 F.T.C. 785, by deleting Paragraph III, which required that disclosure notice of third party purchase be incorporated into instruments of indebtedness.

Appearances

For the Commission: *Phillip R. Fine.*

For the respondents: *Donald H. Powers, Terrell, Williams & Salim,* Cleveland, Ohio.

ORDER MODIFYING FINAL ORDER

Pursuant to Section 3.72(b)(2) of the Commission's Rules of Practice, and after consideration of respondents' petition of October 6, 1977 to reopen and delete Paragraph III of the final order to cease and desist dated November 15, 1972, and after further consideration of the response of the Bureau of Consumer Protection in support of such petition,

It is ordered, That the proceedings be, and they hereby are, reopened for the limited purpose of deleting Paragraph III from the final order to cease and desist.

It is further ordered, That Paragraph III be deleted from the final order to cease and desist dated November 15, 1972.

IN THE MATTER OF

RYDER SYSTEM, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2915. Complaint, Dec. 28, 1977 — Decision, Dec. 28, 1977

This consent order, among other things, requires a Miami, Fla. vocational training correspondence school to cease misrepresenting or failing to disclose pertinent facts regarding industry demand, government and industry requirements; job placement; and location of training sites. Respondent is required to provide enrollees with prescribed forms and disclosures relating to rights of cancellation and refund; and employment success of former graduates. Further, respondent is required to make restitution to those former students determined to be eligible, in the manner and form set forth in the order.

Appearances

For the Commission: *Donald Williams.*

For the respondent: *Richard J. Wertheimer* and *M. Jean Anderson, Arnold & Porter,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Ryder System, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Ryder System, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal place of business located at 2701 South Bayshore Drive, in the city of Miami, State of Florida.

Respondent now, and for some time last past has been primarily engaged in the formulation, development, offering for sale, sale and distribution of courses of instruction purporting to prepare graduates thereof for entry-level employment as truck drivers, automobile mechanics, diesel mechanics, air conditioner mechanics and repairmen, refrigeration mechanics and repairmen, machinists, welders, heavy equipment operators, heavy equipment mechanics, body and

fender repairmen, electronics technicians, computer technicians, mechanical draftsmen and architectural draftsmen.

PAR. 2. In the course and conduct of its business of offering for sale, sale and distribution of courses of instruction, respondent through home-study branch facilities and resident training facilities which it owned, organized and operated, and by means of wholly-owned subsidiaries, has authorized individuals and entities to solicit and write enrollments in respondent's corporate title and under the trade names "Greer Technical Institute," "Lincoln Technical Institute," "National Professional Truck Driver Training," "Radio Television Technical School," "Electronics Training Center" and "Ryder Technical Institute."

Respondent, through its said home-study branch facilities and resident training facilities, places into operation and implements a sales program whereby members of the general public, by means of advertisements placed in broadcast and printed media of general circulation, and by means of brochures, pamphlets and other promotional literature disseminated through the United States mails or by means of other statements, representations, acts and practices as hereinafter set forth, are induced to sign contracts or enrollment agreements for a course of home-study and/or resident training of a stated length of time and for a stated tuition cost.

Respondent arranges or assists in the arrangement of credit and deferred payment terms for the financing of said executed contracts, and accepts the proceeds thereof.

In the manner aforesaid, respondent dominates, controls, furnishes the means, instrumentalities, services and facilities for, and condones, approves, and accepts the pecuniary and other benefits flowing from the acts and practices hereinafter set forth of respondent's home-study branch facilities and resident training facilities.

Alternatively, with respect to the acts and practices of respondent's home-study branch facilities and resident training facilities hereinafter set forth, respondent knew or should have known of the said acts and practices and failed to exercise its control to curb the said acts and practices.

PAR. 3. In the course and conduct of its business, as aforesaid, respondent now causes, and for some time last past has caused, said aforementioned courses of instruction to be distributed from its places of business to said aforementioned home-study branch facilities and resident training facilities located in various States of the United States other than the state of origination of said courses. Respondent transmits and receives, and causes to be transmitted and

received, in the course of the sale of, distribution of and financing of its courses of instruction by said home-study branch facilities and resident training facilities among and between the several States of the United States, retail installment contracts, financial reports, checks, monies or other commercial paper.

Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in said courses of instruction in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its aforesaid business, and to induce the purchase of its courses of instruction by members of the general public, respondent and its home-study branch facilities and resident training facilities have disseminated, or caused the dissemination of, via the United States' mail or other means, radio, television, newspaper, print media or other forms of advertising, or other means and instrumentalities which are furnished, approved, created or condoned by respondent. In conjunction therewith, respondent and its home-study branch facilities and resident training facilities and the salespersons of its home-study facilities and resident training facilities have made certain statements and representations respecting the existence of a substantial and continuing demand for graduates of respondent's courses, the lack of cost of placement services offered, the employment security of persons employed in the trucking industry, the amount of time required to complete successfully respondent's tractor-trailer driver course, and the approval by the Veterans Administration of respondent's schools or courses.

Typical of the statements and representations, but not all inclusive thereof, are the following:

A. Radio and Television

Would you like to hear some good news for a change? You don't have to continue being worried about job layoffs and earning a living wage. As you know almost every major industry in the country is laying off people. Yet there is still a shortage of trained tractor-trailer drivers. Drivers in the expanding trucking industry have above average earnings and job security. There are still good jobs waiting to be filled by trained drivers. If you are 21 or over, in good health, and have a good driving record, NATIONAL PROFESSIONAL TRUCK DRIVER TRAINING, A RYDER SCHOOL, can train you for one of these jobs.

B. Newspaper and Direct Mail

Free job placement service

* * * * * * *

TRACTOR-TRAILER STUDENTS NEEDED
Men, you are 3 weeks or 8 weekends away from driving the big rigs . . . local and over-the-road. Train full time or weekends.

* * * * * * *

APPROVED FOR VETERANS
TRAIN TO BECOME A
TRACTOR TRAILER DIESEL
DRIVER IN A FEW WEEKS
EFFECTIVE PLACEMENT SERVICE
Minimum Age 20 Years
OUR drivers in constant demand

* * * * * * *

BE A TRACTOR-TRAILER DRIVER . . . VA APPROVED "Vets & GI's"

* * * * * * *

This School is VA Approved

* * * * * * *

ATTENTION MEN TRAIN NOW TO OPERATE HEAVY EQUIPMENT

.BULLDOZER DRAGLINE.
.FRONT END LOADER SHOVEL.
.GRADER CLAM SHELL.
Resident Training on the Big Equipment, High paying jobs in the construction industry will be available for trained men.

* * * * * * *

C. Promotional Material

Job Opportunities
for the trained Tractor-Trailer Driver
58,000 new drivers needed through the 1970's

.Expanding National Economy
.Decentralized Manufacturing
.Declining Railroad System
.Growing Interstate Highway Network

* * * * * * *

JOB OPPORTUNITIES FOR OPERATING ENGINEERS
36% ANNUAL GROWTH IN U.S. THROUGH THE 70's...
410,000 JOBS PROJECTED FOR 1980.
Federal Government's multibillion-dollar Interstate expressway program is but one example of massive use of materials and skilled men. Other Federal, State,

County and City programs, and private projects boost the need for trained Heavy Equipment Operators all across America.

* * * * * * *

Ryder Technical Institutes . . . Teach skills to meet strongest job demand

* * * * * * *

RYDER KNOWS THE TRUCKING INDUSTRY and what kinds of drivers are needed and hired. Ryder trains to place.

PAR. 5. By and through the use of the above-quoted statements and representations, and others of similar import and meaning, but not expressly set out herein, respondent and its home-study branch facilities and resident training facilities and the salespersons of the home-study branch facilities and the resident training facilities have represented, directly or by implication, that:

1. There is an urgent need or demand for all or most graduates of respondent's tractor-trailer driver and heavy equipment operator courses in positions for which respondent trains such persons.

2. Respondent had a reasonable basis from which to conclude that:

(a) there was at the time such representations were made, or

(b) would be at the time that persons then enrolling graduated,

an urgent need or demand for all or most graduates of respondent's tractor-trailer driver and heavy equipment operator courses in positions for which respondent trains such persons.

3. All or substantially all graduates of respondent's tractor-trailer driver and heavy equipment operator courses are able, on graduation, to secure the positions for which respondent has trained them.

4. The placement assistance furnished by respondent is free.

5. Unlike a person employed in a non-trucking industry, a person employed in the trucking industry does not experience layoffs.

6. A purchaser will complete respondent's tractor-trailer driver course and qualify for employment as a tractor-trailer driver within three weeks of beginning the course on a full-time basis or within eight weekends of beginning the course on a part-time basis.

7. Respondent's schools or courses are approved by the Veterans Administration.

PAR. 6. In truth and fact:

1. At the time it was so represented there was not an urgent need or demand for all or most graduates of respondent's tractor-trailer

driver and heavy equipment operator courses in positions for which respondent trains such persons.

2. Respondent had no reasonable basis from which to conclude that:

(a) there was at the time such representations were made, or

(b) would be at the time that persons then enrolling graduated,

an urgent need or demand for all or most graduates of respondent's tractor-trailer driver and heavy equipment operator courses in positions for which respondent trains such persons.

3. All or substantially all graduates of respondent's tractor-trailer driver and heavy equipment operator courses are not able, on graduation, to secure the positions for which respondent has trained them.

4. The placement assistance furnished by respondent is not free, but, rather is included in the tuition cost of respondent's courses.

5. As is true of a person employed in a non-trucking industry, a person employed in the trucking industry does experience layoffs.

6. A purchaser cannot complete respondent's tractor-trailer driver course and qualify for employment as a tractor-trailer driver within three weeks of beginning the course on a full-time basis or within eight weekends of beginning the course on a part-time basis.

7. Respondent's schools or courses are not approved by the Veterans Administration. Respondent's schools merely offer some courses that an appropriate state agency has approved as courses a veteran may attend and become eligible to receive veterans' educational assistance benefits from the United States Government.

Therefore, the statements and representations set forth in Paragraphs Four and Five hereof were, and are, false, misleading or deceptive acts or practices.

PAR. 7. Respondent, in offering for sale courses of instruction purporting to prepare graduates thereof for entry-level employment as tractor-trailer drivers and heavy equipment operators, failed to disclose in advertising or through the salespersons of its home-study facilities and resident training facilities the following information with respect to each school for each course offered:

1. The percentage of recent graduates who were able to obtain employment in the positions for which they were trained;

2. The employers that hired any such recent graduates;

3. The initial salary any such recent graduates received; and

4. The percentage of recent enrollees who have failed to complete their courses of instruction.

Knowledge of such facts would be an indication of the probability of

graduating from respondent's courses and would indicate the possibility of securing future employment upon graduating and the nature of such employment. Thus, respondent has failed to disclose material facts which, if known to a consumer, would be likely to affect his or her consideration of whether or not to purchase such courses of instruction. Therefore, the aforesaid acts and practices were, and are, false, misleading, deceptive or unfair acts or practices.

PAR. 8. Respondent, in offering for sale a tractor-trailer driver course, failed to disclose in a clear and conspicuous manner:

(a) that the United States Department of Transportation has established certain requirements which must be met before a person may drive a tractor-trailer;

(b) that various states maintain certain requirements that must be met before a person is licensed as a tractor-trailer driver;

(c) that many employers of tractor-trailer drivers will not accept an applicant for a position as a tractor-trailer driver unless he or she is at least twenty-five years of age and has previous experience driving tractor-trailers;

(d) that in order to attain a position as a tractor-trailer driver, a person may be required to join a union.

Knowledge of such facts would aid a consumer in determining the likelihood that he or she could meet governmental standards for tractor-trailer drivers and would be an indication of the possibility of securing future employment upon graduating from said course and the nature of such employment. Thus, respondent has failed to disclose material facts which, if known to a consumer, would be likely to affect his or her consideration of whether or not to purchase said course of instruction. Therefore, the aforesaid acts and practices were and are, false, misleading, deceptive or unfair acts or practices.

PAR. 9. Respondent, in offering for sale a tractor-trailer driver course, failed to disclose in a clear and conspicuous manner the location of the residential training center at which enrollees who have read, viewed or heard a given advertisement will receive their resident training. Knowledge of such facts would be an indication of the full cost and time requirements of enrolling in said course. Thus, respondent has failed to disclose material facts which, if known to a consumer, would be likely to affect his or her consideration of whether or not to purchase said course of instruction. Therefore, the aforesaid acts and practices were, and are, false, misleading, deceptive or unfair acts or practices.

PAR. 10. Respondent, in offering for sale a tractor-trailer driver course, failed to disclose, in a clear and conspicuous manner, the

minimum amount of time which would be spent driving tractor-trailers and the minimum number of miles which tractor-trailers would be driven by each enrollee who graduates from said course. Knowledge of such facts would be an indication of the potential usefulness of the course in obtaining future employment. Thus, respondent has failed to disclose material facts which, if known to a consumer, would be likely to affect his or her consideration of whether or not to purchase said course of instruction. Therefore, the aforesaid acts and practices were, and are, false, misleading, deceptive or unfair acts or practices.

PAR. 11.

(a) Respondent, as aforesaid, has been and is now failing to disclose material facts while using other false, misleading, deceptive or unfair acts or practices, to induce persons to pay over to respondent substantial sums of money to purchase courses of instruction whose value to the said persons for future employment in the jobs for which training was offered was virtually worthless. Respondent has received the said sums and has failed to offer to refund and refused to refund such money to such purchasers of its courses.

The use by respondent of the aforesaid practices and its continued retention of the said sums, as aforesaid, is an unfair act or practice.

(b) In the alternative and separate from subparagraph (a) above, respondent, who is in substantial competition in commerce with corporations, firms and individuals engaged in the sale of courses of vocational instruction, has been and is now, as aforesaid, failing to disclose material facts while using false, misleading, deceptive or unfair acts or practices, to induce persons to pay over to respondent substantial sums of money to purchase courses of instruction.

The effect of using these aforesaid acts and practices to secure substantial sums of money is or may be to substantially hinder, lessen, restrain or prevent competition between the respondent and the aforesaid competitors.

PAR. 12. By and through the use of the aforesaid acts and practices, respondent places in the hands of others the means and instrumentalities by and through which it may mislead and deceive the public in the manner and as to the things hereinabove alleged.

PAR. 13. In the course and conduct of their business, and at all times mentioned herein, respondent has been and now is in, substantial competition in commerce with corporations, firms and individuals engaged in the sale of courses of instruction covering the same or similiar subjects.

PAR. 14. The use by respondent of the aforesaid false, misleading, unfair or deceptive statements, representations, acts and practices,

has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true, and to induce a substantial number thereof to purchase respondent's courses by reason of said erroneous and mistaken belief.

PAR. 15. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having issued its complaint charging the respondent named in the caption hereto with violation of the Federal Trade Commission Act, and the respondent having been served with a copy of the complaint the Commission issued, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint issued, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Ryder System, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at 2701 South Bayshore Drive, Miami, Florida.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondent Ryder System, Inc., a corporation, and respondent's agents, representatives, employees, successors and assigns, directly or through any corporation, subsidiary, division, franchisee or other device, in connection with the creation, advertising, promotion, offering for sale, or distribution to individual students of home study courses or combination home study-resident training courses or tractor-trailer drive or heavy equipment operator resident courses of study in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Representing, orally, visually, or in writing, directly or by implication, that:

(a) The placement assistance furnished by respondent is free; or misrepresenting, orally, visually, or in writing, the cost of any placement assistance or service.

(b) Unlike a person employed in a non-trucking industry, a person employed in the trucking industry does not experience layoffs; or misrepresenting, orally, visually, or in writing, the conditions of employment in the trucking industry or in any other industry.

(c) A purchaser will complete respondent's entire combination home study-resident training tractor-trailer driver course and qualify for employment as a tractor-trailer driver within three weeks of beginning the course; or misrepresenting, orally, visually, or in writing, the length of time required to complete any course of instruction offered by respondent which is subject to part I of this order.

(d) Respondent's schools or courses are "approved" by the Veterans Administration; or misrepresenting, orally, visually, or in writing, the extent or nature of any approval or other form of government action taken with respect to any school or course of instruction.

(e)(i) There is a substantial demand, or a demand of any size or proportion, for persons completing any course offered by respondent which is subject to part I of this order,

(ii) or otherwise representing that opportunities for employment, or opportunities of any type or number are available to such persons, except in the form as hereinafter provided in part I, paragraphs 6(a)(ii)a. and 6(b)(ii)a. of this order, provided, however, that respondent shall cease and desist making such representations with respect to any such new school location or such new course of

instruction unless the respondent in each and every instance shall have in good faith conducted a statistically valid survey which establishes the validity of any such representations at all times when the representations are made, and have disclosed in immediate and conspicuous conjunction with any such representation, that:

> All representations of potential employment demand or opportunities for graduates of this school (course) are estimates. This school (course) has not been in operation (offered) long enough to indicate what actual employment may result upon graduation.

(iii) After the passage of the ten-month period to be determined pursuant to part I, paragraphs 6(a)(ii)e. and 6(b)(ii)d. of this order, and until two years after establishment of a new school location by respondent in any metropolitan area or state where it did not previously operate a school, and after the introduction by respondent of any new course of instruction subject to part I of this order, at any school or location, respondent shall:

a. make any such representations in the form and manner provided in part I, paragraphs 6(a)(ii)a. and 6(b)(ii)a. of this order, and

b. disclose in immediate and conspicuous conjunction with any such representation, that:

> This school (course) has been in operation (offered) since (insert date on which school or course commenced).

2. Using orally, in writing, or in any other manner at any time statistical data or numerical estimates, derived from any source whatsoever, other than the statistical data or numerical estimates referred to in part I, paragraph 1(e) of this order, respecting present or future occupational demand or the growth of employment or the salaries earned in any field, or misrepresenting in any manner the meaning, application, relevancy or import of any statistical data or statistical projections of any type from any source.

3. Failing to keep adequate records which may be inspected by Commission staff members upon reasonable notice, and which shall be maintained by respondent for so long as the material covered by part I, paragraphs 3(a) or 3(b) of this order is disseminated or approved for dissemination, or a statement covered by paragraphs 3(a) or 3(b) of this order is made by said respondent, and for a further period of five (5) years after said respondent's last dissemination or approval of dissemination of such material or such statement:

(a) Which disclose the facts upon which any statement of demand, placement percentages or claims, or other representations of the type described in part I, paragraphs 1(e), 6(a)(ii)a., and 6(b)(ii)a. through 6(a)(ii)c. of this order are based; and

(b) From which the validity of any statements of demand, placement percentages or claims, or other representations of the type described in part I, paragraphs 1(e), 6(a)(ii)a. through 6(a)(ii)c., and 6(b)(ii)a. through 6(b)(ii)c. of this order was determined; and

(c) Which reflect the delivery and date of delivery of the data described in part I, paragraphs 6(a), 6(b), and 8 of this order.

(d) Which reflect the delivery of the refunds described in part I, paragraph 7 of this order.

4. Enrolling any person in any tractor-trailer driver course which is subject to part I of this order before delivering to that person a notice concerning United States Department of Transportation requirements in the language, manner and form shown in Appendix A to this order.

5. Enrolling any person in any tractor-trailer driver course which is subject to part I of this order before delivering to that person a list of respondent's resident training centers in the language, manner and form shown in Appendix A to this order.

6. (a) Failing to deliver to each person who shall contract with respondent for the purchase of any tractor-trailer driver course subject to part I of this order, a written notice, printed in at least 10-point type which shall disclose in the form provided in Appendix B, the following information and none other:

(i) The title "IMPORTANT INFORMATION" printed in boldface type across the top of the form.

(ii) Paragraphs reciting the following information to be computed in the language, manner and form set forth below for the applicable base period as hereinafter defined in part I, paragraph 6(a)(ii)e. of this order:

a. For any tractor-trailer driver course subject to part I of this order offered by respondent for each school, location or facility at which respondent offers said course of instruction:

The dates of the "base period" as computed in part I, paragraph 6(a)(ii)e. of this order; the total number of students who graduated during such base period; the total number of students who responded to respondent's inquiry concerning employment status in the three months following graduation; the numbers and percentages of such responding graduates who responded that they had attained employment as tractor-trailer drivers, with such information accompanied by the following disclosures:

i. Requirements for licensing tractor-trailer drivers vary from state to state. Many states require license applicants to take road tests on the types of vehicles they expect to drive, and the applicants are required, at their own expense, to furnish the vehicles needed to take the road tests. In addition to the usual visual

tests and written tests which states require, some states also require applicants to take specialized written tests relating to the types of vehicles they expect to drive. You should determine the requirements for licensing tractor-trailer drivers in the state in which you intend to seek a license.

ii. You should also obtain information concerning employment in the types of trucking jobs in which you might like to work after graduation. Some employers will hire drivers who are under the age of twenty-five or who lack previous tractor-trailer experience and some employers will not. Some tractor-trailer jobs require union membership and some jobs do not. You should explore the availability of the particular type of job in which you are personally interested.

b. As to the same graduates who respond to respondent's inquiry concerning employment and are used to compute the placement statistics in part I, paragraph 6(a)(ii)a. of this order, separately, for each school, location or facility at which respondent offers said course, a list of all firms or employers which are known to have hired any of such graduates during the base period; and the number of such graduates hired by each firm or employer in the position of a tractor-trailer driver.

c. As to the same graduates used to compute part I, paragraph 6(a)(ii)a. of this order, the hourly starting wages and incomes of said graduates who are known to have attained full-time employment as tractor-trailer drivers. Such wages or incomes shall be stated in consecutive categories of one dollar amounts, in the form described in Appendix B (*e.g.*, $3.00 to $3.99, $4.00 to $4.99 . . .) or, if such hourly wages and incomes are not known, the monthly wages and incomes which are reported to respondent.

d. In compiling the foregoing information, respondent shall not include any such graduates who respondent knows have not retained such positions for more than one month from the initial date of employment. Respondent may use information supplied by graduates, employers, or other sources and shall not be required to obtain such information independently.

e. "Base Period" shall mean a six (6) month period beginning ten (10) months before and ending four (4) months before the date on which respondent must begin to disseminate the necessary statistics with respect to the base period. There shall be two base periods each year, one beginning on January 1 and concluding on June 30; the other shall begin on July 1 and conclude on December 31.

There shall be a four (4) month period immediately following the close of a base period during which respondent shall gather the necessary statistics with respect to said base period. These statistics will relate to those graduates who successfully completed the particular course of instruction during the base period and who

reported employment during the base period. Respondent may not include in the computation of the statistics for the base period any persons who graduated during the months after the base period; such persons will be included in statistics for the base period during which they graduate.

On the first day of the fifth month following the close of each base period, respondent shall begin to distribute statistics relating to the last completed base period. Respondent shall continue to distribute said statistics until the first day of the fifth month following completion of the next base period.

For any six-month period during which respondent has no graduates for a particular course of instruction, respondent may continue to distribute the statistics with respect to the prior base period for said course of instruction until such time as respondent has graduates of said course of instruction and has had four (4) months in which to gather statistics with respect to those graduates.

(b) Failing to deliver to each person who shall contract with respondent for the purchase of any course of instruction which is subject to part I of this order, other than a course described in part I, paragraph 6(a) of this order, a written notice printed in at least 10-point type which shall disclose in substantially the same form as provided in Appendix B the following information and none other:

(i) The title "IMPORTANT INFORMATION" printed in boldface type across the top of the form.

(ii) Paragraphs reciting the following information to be computed in the manner set forth below for the applicable base period defined in part I, paragraph 6(a)(ii)e. of this order:

a. For each such course of instruction offered by respondent for each school, location or facility at which respondent offers said course of instruction:

The dates of the "base period" as computed in part I, paragraph 6(a)(ii)e. of this order; the total number of students who graduated during such base period; the total number of students who responded to respondent's inquiry concerning employment status in the three months following graduation; and the numbers and percentages of such responding graduates who advised respondent that they had attained employment in the fields for which such graduates were trained. Such information must include an accurate description of each position in which such graduates attained employment.

b. As to the same graduates used to compute the placement and employment statistics in part I, paragraph 6(b)(ii)a. of this order, a list of all employers which are known to have hired any such

graduates during the base period, the number of such graduates hired by each firm or employer and the positions in which said graduates were hired.

c. As to the same graduates used to compute the statistics in part I, paragraph 6(b)(ii)a. of this order, the hourly starting wages or incomes of said graduates. Such wages or incomes shall be classified by number of graduates attaining employment in each position described in part I, paragraph 6(b)(ii) of this order and shall be stated in consecutive categories of one dollar amounts, in the form described in Appendix B (*e.g.*, $3.00 to $3.99, $4.00 to $4.99 . . .) or, if such hourly wages and incomes are not known, the monthly wages and incomes which are reported to respondent.

d. In preparing the information required in part I, paragraphs 6(a)(ii)a. through c. of this order, respondent shall follow the instructions set forth in part I, paragraphs 6(a)(ii)d. through e. of this order.

7. Contracting for any sale of any course of instruction which is subject to part I of this order in the form of a sales contract or other agreement which shall become binding prior to midnight of the third business day after receipt by a customer of the form of notice provided in part I, paragraph 8 of this order. Upon cancellation of any said sales contract or other agreement as provided for in part I, paragraph 8 of this order, respondent is obligated to refund within ten (10) business days to any person exercising the cancellation right all the monies paid or remitted up to the notice of cancellation.

8. Failing to deliver to each person who shall contract with respondent for the purchase of any course of instruction which is subject to part I of this order, a one-page form (hereinafter "cancellation form") in duplicate, that contains the following unsigned statement printed in boldface type of at least ten (10) points:

IMPORTANT

NOTICE TO THE PURCHASER

THE ENROLLMENT CONTRACT THAT YOU SIGNED WITH (NAME OF SCHOOL) ON (DATE) TO ENROLL IN (NAME OF COURSE) MAY BE CANCELLED BY YOU, FOR ANY REASON, IF YOU SIGN THIS STATEMENT AND MAIL IT TO THE ABOVE NAMED SCHOOL WITHIN THREE (3) DAYS FROM THE TIME THAT YOU RECEIVED THIS STATEMENT. YOU ARE THUS FREE TO CANCEL YOUR ENROLLMENT AND RECEIVE A FULL REFUND OF ANY MONIES YOU HAVE PAID TO THE SCHOOL. IF YOU DO WANT TO CANCEL, YOU SHOULD SIGN YOUR NAME BELOW

AND MAIL THIS STATEMENT TO THE SCHOOL WITHIN THREE (3) DAYS. KEEP THE DUPLICATE COPY FOR YOUR OWN RECORDS.

_____

DATE

_____

SIGNATURE

9. The cancellation form shall not contain any information or representations other than the information specified in part I, paragraph 8 of this order, and the cancellation form shall be delivered along with the data required by part I, paragraph 6 of this order. The cancellation form and said data shall be delivered by respondent no later than the next business day after the person shall have contracted for the purchase of any course of instruction which is subject to part I of this order. During such period provided for in part I, paragraph 8 of this order respondent shall not initiate contact with such person other than that required by this paragraph.

10. Making any representation of any kind whatsoever in connection with the advertising, promoting, offering for sale, sale or distribution of any course of study subject to part I of this order, for which respondent has no reasonable basis prior to the making or dissemination thereof.

11. In the event that the Commission promulgates a trade regulation rule on advertising, disclosure, cooling-off, or refund requirements for proprietary vocational and home study schools, or any trade regulation rule providing for the disclosure of employment or similar data to prospective students, then part I, paragraphs 1(e), 2, 3, 6, 7, 8 and 9 of this order shall be superseded thereby, and such trade regulation rule shall completely supersede and replace said paragraphs and such trade regulation rule shall become part of this order.

II

1. *It is further ordered,* That:

(a) Respondent deliver a copy of this decision and order to each of its present and future employees, salesmen, agents, solicitors, independent contractors or to any other person or entity which promotes, offers for sale, sells or distributes any course of instruction included within the scope of this order.

(b) Respondent provide each person or entity so described in part II, paragraph 1(a) of this order with a form returnable to the respondent clearly stating his or her intention to be bound by and to conform his or her business practices to the requirements of this

order; retain said statement during the period said person or entity is so engaged and for a period of five (5) years thereafter; and make said statement available to the Commission's staff for inspection and copying upon request.

(c) Respondent inform each person or entity so described in part II, paragraph 1(a) of this order that the respondent will not use or engage or will terminate the use or engagement of any such party, unless such party agrees to and does file notice with the respondent that he or she will be bound by the provisions contained in this order.

(d) If such party as described in part II, paragraph 1(a) of this order will not agree to so file the notice set forth in part II, paragraph 1(b) of this order with the respondent and be bound by the provisions of the order, the respondent shall not use or engage or continue the use or engagement of, such party to promote, offer for sale, sell or distribute any course of instruction included in this order.

(e) Respondent herein inform the person or entities described in part II, paragraph 1(a) of this order that the respondent is obligated by this order to discontinue dealing with or to terminate the use or engagement of persons or entities who continue on their own the acts or practices prohibited by this order.

(f) Respondent herein discontinue dealing with or terminate the use or engagement of any person or entity described in part II, paragraph 1(a) of this order, who continues on his or her own any act or practice prohibited by this order.

2. *It is further ordered,* That respondent shall forthwith distribute a copy of this order to each of its divisions or subsidiary corporations which is involved in the advertising, promotion or sale of any course of instruction included within the scope of this order.

III

It is further ordered, That:

1. Within thirty (30) days after the date this order is served on respondent (hereinafter "date of service") respondent shall employ an independent contractor acceptable to the Compliance Division of the Bureau of Consumer Protection of the Commission (hereinafter "Compliance Division").

2. Within ninety (90) days after the date of service, respondent shall compile a list from records in respondent's possession, custody, or control and from information which may be transmitted to respondent by the Commission or by others within said number of days. That list shall state the following with respect to each person who completed the resident training portion of respondent's tractor-

trailer driver course between January 1, 1970 and December 31, 1972, and each person who completed the resident training portion of respondent's heavy equipment operator course between January 1, 1971 and December 31, 1973 (hereinafter "the graduates"):

(a) Name; and

(b) Last known address; and

(c) Course and date of completion; and

(d) Total tuition paid by or for such graduate to respondent; and

(e) The other names and addresses that appear in the student or placement file of respondent relating to each graduate.

3. Within ninety (90) days after the date of service, respondent shall give to the independent contractor the list described in part III, paragraph 2 of this order.

4. On the one hundred and twentieth (120th) day after the date of service, the independent contractor shall deposit in the United States mail, first class postage prepaid, an envelope addressed to each graduate at his or her last known address. Each envelope shall bear the independent contractor's return address and shall contain:

(a) A copy of the letter and the appropriate affidavit that appear in the language, manner, and form shown in Appendices C, D, and E; and

(b) A first class postage prepaid envelope addressed to the independent contractor.

5. If any envelope mailed to a graduate pursuant to part III, paragraph 4 of this order is returned to the independent contractor by the United States Postal Service, then, within five (5) business days after each such envelope is returned, the independent contractor shall deposit in the United States mail, first class postage prepaid, an envelope addressed to each name and address described in part III, paragraph 2(e) of this order. Each envelope shall bear the independent contractor's return address and shall contain:

(a) A letter in the language, manner, and form shown in Appendix N; and

(b) A first class postage prepaid envelope addressed to the independent contractor.

6. (a) If, within fifty (50) days after the date set forth in part III, paragraph 4 of this order, the independent contractor receives from any source a new address or addresses for graduates whose names appear on the list described in part III, paragraph 2 of this order, then, within five (5) business days after receiving such new addresses, the independent contractor shall deposit in the United States mail, first class postage prepaid, envelopes which shall be addressed to the graduates at the new address or addresses, bear the

independent contractor's return address, and contain the items described in part III, paragraphs 4(a) and 4(b) of this order.

(b) If, within fifty (50) days after the date set forth in part III, paragraph 4 of this order, the independent contractor receives requests from anyone for a copy of Appendices C, D, E, or for information necessary for the implementation of part III of this order, then, within five (5) business days after receiving such requests, the independent contractor shall deposit in the United States mail, first class postage prepaid, envelopes which shall be addressed to the persons making the requests, bear the independent contractor's return address, and contain the items described in part III, paragraphs 4(a) and 4(b) of this order.

7. The independent contractor shall keep safe all executed copies of Appendices D and E (hereinafter "claimant affidavits") which are delivered to him.

8. Within two hundred (200) days after the date of service, the independent contractor shall transmit to respondent all claimant affidavits in his possession, custody, or control, and shall maintain a record of the names of claimants whose affidavits are transmitted to respondent, the dates such transfers occur, and the dates such claimant affidavits were received by the independent contractor.

9. Respondent's payment obligations pursuant to part III of this order shall be limited to those graduates who meet all of the conditions described in part III, subparagraphs (a) through (g) of paragraph 9 of this order, that is, persons:

(a) Who completed the resident training portion of respondent's tractor-trailer course between January 1, 1970 and December 31, 1972, or who completed the resident training portion of respondent's heavy equipment operator course between January 1, 1971 and December 31, 1973; and

(b) Whose tuition was not paid for in full by his employer or a governmental agency other than the United States Veterans Administration or who had an obligation to repay all or part of the tuition paid in full by said employer or governmental agency; and

(c) Who, (i) in the case of a tractor-trailer course graduate, failed to obtain employment at any time after graduation in a target job, that is, as a truck driver, instructor of truck driving, or manager or safety director or foreman of persons engaged in truck driving; or, (ii) in the case of a heavy equipment course graduate, failed to obtain employment for a reasonable period of time at any time after graduation in a target job, that is, as a heavy equipment operator or instructor of heavy equipment operation, or manager or safety director or foreman of heavy equipment operators, but who either

made a reasonably diligent search for employment in their respective target jobs, or who failed to make such a search for excusable reasons; and

(d) Who have returned to the independent contractor within seventy-five (75) days after the date set forth in part III, paragraph 4 of this order, a claimant affidavit; and

(e) Who, if sent one or more of the letters referred to in part III, paragraph 10(b)(ii) of this order, have returned to the independent contractor by the date set forth in part III, paragraph 10(e) of this order, their responses to such letters; and

(f) Whose properly signed and notarized claimant affidavits, together with responses to any such letters referred to in part III, paragraph 10(b)(ii) of this order, contain sufficient information to establish that they are persons described by part III, paragraphs 9(a) through 9(c) of this order; and

(g) Who agree in writing that, in consideration of the monies received pursuant to part III of this order, he or she releases respondent from any and all further claims, known and unknown, with respect to or arising from tuition for respondent's course or courses.

10. (a) Within two hundred and thirty (230) days after the date of service, respondent shall identify each claimant affidavit which respondent asserts to be so incomplete, ambiguous, or internally inconsistent that respondent cannot fairly decide whether the person submitting such a claimant affidavit is a person described in part III, paragraphs 9(a) through 9(d) of this order.

(b) With respect to each person submitting such an incomplete, ambiguous, or internally inconsistent claimant affidavit, respondent shall, on the two hundred and thirtieth (230th) day after the date of service, deposit in the United States mail, first class postage prepaid, an envelope which shall bear the return address of the independent contractor and which shall contain:

(i) That person's claimant affidavit; and

(ii) One or more appropriate form letters in the language, manner and form shown in Appendices F, G, or H, or a specially prepared letter, if none of the form letters is appropriate, requesting that the necessary additional or clarifying information be added to or incorporated in the claimant affidavit; and

(iii) A first class postage prepaid envelope addressed to the independent contractor.

(c) Before mailing a specially prepared letter of the sort described in part III, paragraph 10(b)(ii) of this order, respondent shall first send a copy of the letter and a copy of relevant portions of the

claimant affidavit to the Compliance Division. The Compliance Division shall have seven (7) days, from the time respondent deposits the copy of the letter in the United States mail addressed to the Compliance Division, in which to notify respondent that such a letter is acceptable or unacceptable. If, within those seven (7) days, respondent receives actual written or oral notice from the Compliance Division that a letter is not acceptable, then respondent shall not mail the letter, and respondent and the Compliance Division shall negotiate the wording of the letter. Within one (1) business day after respondent and the Compliance Division reach agreement, a letter acceptable to the Compliance Division shall be mailed. If, within those seven (7) days, the Compliance Division either notifies respondent that a letter is acceptable, or fails to notify respondent that a letter is acceptable or unacceptable, then, on the next business day, respondent shall mail the letter.

(d) Each letter referred to in part III, paragraph 10(b)(ii) of this order shall record the addressee's name, address, and telephone number. Respondent shall retain a copy of each letter.

(e) The deadline for receipt by the independent contractor of responses to the letters described in part III, paragraph 10(b)(ii) of this order shall be midnight on the thirty-fifth (35th) day after the date the letters described in part III, paragraph 10(b)(ii) are mailed. Persons whose responses are received after that time shall not be eligible for any payment under part III of this order.

11. Within two hundred and ninety-five (295) days after the date of service, respondent shall make an initial determination of:

(a) Those persons who are described in part III, paragraphs 9(a) through 9(f) of this order; and

(b) Those persons who have submitted claimant affidavits which show that they are not persons described in part III, paragraphs 9(a) through 9(f) of this order; and

(c) Those persons who respondent has reason to believe are not persons described in part III, paragraphs 9(a) through 9(f) of this order, notwithstanding their claimant affidavits.

12. Within three hundred and five (305) days after the date of service, respondent shall deliver to, or make available, at the option of the Compliance Division, and the Compliance Division shall commence to review:

(a) The initial determination made by respondent pursuant to part III, paragraph 11 of this order; and

(b) All claimant affidavits and any related documents or information which respondent used to make its initial determination.

13. Within three hundred and fifty (350) days after the date of

service, the Compliance Division shall complete its review of the materials described in part III, paragraph 12 of this order. Immediately thereafter, the Compliance Division and respondent shall attempt to resolve any differences concerning the categorization of claimant affidavits and any other questions arising in connection with respondent's performance of part III of this order.

14. Within three hundred and eighty (380) days after the date of service, respondent shall make a final determination of:

(a) Those persons who both the Compliance Division and respondent agree are described by part III, paragraphs 9(a) through 9(f) of this order (hereinafter "eligible graduates"); and

(b) Those persons who both the Compliance Division and respondent agree are not described by part III, paragraphs 9(a) through 9(f) of this order (hereinafter "ineligible graduates"); and

(c) Those persons who respondent considers to be ineligible graduates but who the Compliance Division considers to be eligible graduates (hereinafter "potentially eligible graduates").

15. Arbitration shall determine whether each potentially eligible graduate is a person described by part III, paragraphs 9(a) through 9(f) of this order. Such arbitration shall be conducted according to the following provisions:

(a) Arbitration shall take place in accordance with the Special Arbitration Rules, Appendix I.

(b) Within three hundred and ninety (390) days after the date of service, respondent shall deposit in the United States mail, first class postage prepaid, an envelope, addressed to the American Arbitration Association, that shall contain:

(i) A Demand for Arbitration, in the language, manner, and form of Appendix J, which shall state:

a. That respondent denies that (name of graduate) is an eligible graduate; and

b. The reasons respondent denies that (name of graduate) is an eligible graduate, including any affidavits, documents, or other information supporting respondent's position; and

c. That respondent has submitted the matter to arbitration pursuant to this order of the Commission; and

(ii) A copy of the claimant affidavit of (name of graduate), and a copy of his response, if any, to any letter mailed to him pursuant to part III, paragraph 10(b)(ii) of this order; and

(iii) A copy of the Special Arbitration Rules, Appendix I.

(c) Respondent shall be obligated to transmit to the American Arbitration Association $50.00 with each case submitted to arbitration.

(d) The arbitrator's decision in each matter submitted to him shall be limited to his finding with respect to whether the potentially eligible graduate is a person described by part III, paragraphs 9(a) through 9(f) of this order.

(e) The arbitrator's decision in each and every matter submitted to him shall be transmitted to respondent within four hundred and eighty (480) days after the date of service.

16. (a) Within four hundred and ninety (490) days after the date of service, respondent shall deposit in the United States mail, first class postage prepaid, an envelope addressed to each eligible graduate and to each person who has been determined by arbitration to be a person described by part III, paragraphs 9(a) through 9(f) of this order.

(b) The envelope shall contain two copies of a letter, in the language, manner, and form shown in Appendix K.

17. (a) Within ten (10) days after the date of receipt by the independent contractor of the releases described in part III, paragraph 16(b) of this order, respondent shall compile a registry. Such registry shall contain the names and addresses of those persons whose releases have been received by the independent contractor within twenty (20) business days after the date specified in part III, paragraph 16(a) of this order. The persons whose names appear on the registry shall be the "refund recipients."

(b) Within thirty (30) days after the date of receipt by the independent contractor of the releases described in part III, paragraph 16(b) of this order, respondent shall deliver to the Compliance Division a compliance report consisting of a copy of said registry described in part III, paragraph 17(a) of this order and calculations of refund amounts due each refund recipient.

(c) Within five (5) business days after the date specified in part III, paragraph 17(b) of this order, the Compliance Division shall review said compliance report, and the Director of the Bureau of Consumer Protection shall advise respondent in writing whether payment of such refund amounts to such refund recipients, provided that such payment is made in accordance with part III, paragraph 19 of this order, shall constitute satisfactory compliance by respondent with part III, paragraphs 1 through 19 of this order.

18. Respondent shall pay to each of the refund recipients, as defined in part III, paragraph 17 of this order, an amount as determined below:

(a) Respondent's total payment obligation under this order shall not exceed One Million Five Hundred Thousand Dollars ($1,500,000) under any circumstances.

(b) Respondent's total payment obligation under this order shall be reduced by a sum equal to the monies expended by respondent for:

(i) The cost to respondent of any independent contractor employed pursuant to part III, paragraphs 1 through 19 of this order; and

(ii) Postage costs incurred by any such independent contractor and postage costs and other reasonable out-of-pocket costs incurred by respondent pursuant to part III, paragraphs 1 through 17 of this order; and

(iii) Reasonable personnel costs incurred by respondent pursuant to part III, paragraph 2 of this order; and

(iv) The arbitration costs incurred by respondent pursuant to part III, paragraph 15 of this order, limited to $50.00 per arbitration claim assessed by the American Arbitration Association.

(c) The difference between One Million Five Hundred Thousand Dollars ($1,500,000) and the sum of the costs described in part III, paragraphs 18(b)(i), (ii), and (iii) of this order shall be the "cap figure."

(d) Subject to part III, paragraph 18(e) of this order, the "refund amount" for each refund recipient shall be equal to seventy-five percent (75%) of the total amount of tuition paid to respondent by or for the refund recipient after the following are subtracted from such total amount of tuition paid:

(i) Amounts paid for tuition by a governmental agency other than the United States Veterans Administration, or by the refund recipient's employer without obligation of repayment by the refund recipient; and

(ii) Any prior refunds of tuition paid by respondent to the refund recipient.

(e) If the sum of all refund amounts, as defined by part III, paragraph 18(d) of this order, would be greater than the cap figure, as defined by part III, paragraph 18(c) of this order, then the refund amount for each refund recipient shall be reduced on a pro rata basis so that the total of all refund amounts equals the cap figure.

19. (a) Within ten (10) days after the date specified in part III, paragraph 17(c) of this order, respondent, or, at respondent's option, an independent contractor, shall deposit in the United States mail, first class postage prepaid, an envelope, which shall be addressed to each refund recipient, which shall bear the return address of respondent or the independent contractor, and which shall contain:

(i) One-quarter of the "refund amount" due each refund recipient pursuant to part III, paragraphs 18(d) and (e) of this order; and

(ii) A letter in the language, manner, and form shown in Appendix L.

(b) If the envelope addressed to any refund recipient is returned by the United States Postal Service, then respondent or the independent contractor shall attempt to locate such refund recipient through as many of the following methods as are necessary:

(i) Sending a first class postage prepaid letter in the language, manner, and form shown in Appendix M, together with a first class postage prepaid envelope, to each of the names and addresses that relate to the refund recipient and that are in the respondent's or the independent contractor's possession, custody, or control either by reason of part III, paragraphs 7 or 9(d) of this order or by reason of information received by respondent or the independent contractor subsequent to the date of service.

(ii) Telephoning any telephone numbers that relate to the refund recipient and that are in the respondent's or the independent contractor's possession, custody, or control either by reason of part III, paragraphs 7 and 9(d) of this order or by reason of information received by respondent or the independent contractor subsequent to date of service.

(iii) Requesting the assistance of the Social Security Administration (hereinafter "SSA") by:

a. Providing SSA with the refund recipient's name and SSA number, if it is known; and

b. Providing SSA with a first class postage prepaid letter which shall bear the refund recipient's name on the envelope and which shall request the refund recipient to inform respondent or the independent contractor of his current address; and

c. Tendering any required fee for such services to SSA; and

d. Requesting SSA to mail such letter to the refund recipient.

(c) If respondent or the independent contractor can locate the refund recipient's current address through the methods specified by part III, paragraph 19(b) of this order, then respondent or the independent contractor shall mail to the refund recipient, at his current address, the items described in part III, paragraph 19(a) of this order.

Provided, however, that respondent or the independent contractor shall be entitled to deduct from the amount specified in part III, paragraph 19(a)(i) of this order for each refund recipient an amount equal to the reasonable out-of-pocket costs incurred by respondent in locating such refund recipient.

(d) Neither respondent nor the independent contractor shall have any duty to attempt to locate refund recipients except by the methods specified in part III, paragraph 19(b) of this order.

20. No later than one (1) year after the date specified in part III,

paragraph 19(a) of this order, respondent, or, at respondent's option, an independent contractor, shall commence again to perform the tasks described in part III, paragraph 19 of this order.

21. No later than two (2) years after the date specified in part III, paragraph 19(a) of this order, respondent, or, at respondent's option, an independent contractor, shall commence again to perform the tasks described in part III, paragraph 19 of this order.

22. No later than May 1, 1979, or two (2) years, nine (9) months after the date specified in part III, paragraph 19(a) of this order, whichever date is later to occur, respondent, or, at respondent's option, an independent contractor, shall commence again to perform the tasks described in part III, paragraph 19 of this order.

23. Respondent shall maintain records and documents relating to respondent's compliance with part III of this order for a period of three (3) years following the date of the final payment by respondent pursuant to part III of this order and such records and documents shall be made available to the Compliance Division at respondent's offices upon reasonable notice.

24. Within sixty (60) days after performing all the tasks described in part III, paragraph 19 of this order, within sixty (60) days after performing all the tasks described in part III, paragraph 20 of this order, within sixty (60) days after performing all the tasks described in part III, paragraph 21 of this order, and within sixty (60) days after performing all the tasks described in part III, paragraph 22 of this order, respondent shall file with the Commission a written report setting forth the manner and form in which respondent has complied with part III of this order.

25. If any task required to be performed or completed on a day certain under part III of this order falls upon a non-business day, then the task shall be performed on the following business day.

26. For good cause shown, the Commission's Assistant Director for Compliance may grant extensions of time to respondent, the independent contractor, the arbitrator, or the Compliance Division, of up to thirty (30) days at any one time, for the performance of any of the provisions of part III of this order. In considering "good cause," the Assistant Director for Compliance shall take into account needs resulting from any extensions previously granted.

27. Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of which may affect compliance obligations arising from this order.

APPENDIX A

IMPORTANT INFORMATION

Department of Transportation Requirements

A person who wishes to obtain a tractor-trailer driver position with an interstate motor carrier is obliged to meet certain age, mental and physical requirements established by the United States Department of Transportation (DOT). You are advised to obtain full information concerning the DOT requirements and to determine prior to enrollment whether there is anything which might disqualify you from meeting these requirements.

For full information about the DOT requirements, call or write:

Bureau of Motor Carrier Safety Federal Highway Administration
Department of Transportation Washington, D.C. 20590

Resident Training Centers

In order to complete Ryder's tractor-trailer driver course, it will be necessary for you to spend [length of time] at one of Ryder's resident training centers listed below:

[Insert all addresses of resident training centers]

APPENDIX B

Date:

Note: This table, compiled for period ending [ ], supersedes all previous editions.

IMPORTANT INFORMATION

Regarding Students of Ryder Technical Institute's Home Study Division Professional Truck Driver Training Course

NOTE: Requirements for licensing tractor-trailer drivers vary from state to state. Many states require license applicants to take road tests on the types of vehicles they expect to drive, and the applicants are required, at their own expense, to furnish the vehicles needed to take the road tests. In addition to the usual vision tests and written tests which states require, some states also require applicants to take specialized written tests relating to the types of vehicles they expect to drive.

You should also obtain information concerning employment in the types of trucking jobs in which you might like to work after graduation. Some employers will hire drivers who are under the age of twenty-five or who lack previous tractor-trailer experience and some employers will not. Some tractor-trailer jobs require union membership and some jobs do not. You should explore the availability of the particular type of job in which you are personally interested.

Information Regarding Post-Graduate Employment of Graduates: Results of Student Survey Within 90 Days of Graduation

Jan—June, 1974	*Number*	*Percent*
Total Graduates	100	100

Graduates Responding to Inquiries Within 3 Mos. of Graduation	50	50
Responding Graduates Who Reported Employment as Tractor-Trailer Drivers Within 3 Mos. of Graduation, as a Percentage of Total Responding Graduates	40	80
Responding Graduates Who Reported Employment as Tractor-Trailer Drivers, as a Percentage of Total Graduates	—	40
Responding Graduates Who Reported Other Employment and Types of Such Employment	5	—
Graduates Who Did Not Respond to Inquiries	50	50

Certain Employers Known to Have Hired Persons Who Graduated from Ryder's National Professional Truck Driver Training Courses

As Tractor-Trailer Drivers

Employers	*Employers Address*	*Jan/June 1974 Graduates Hired*
A Company	———	4
B Company	———	2
C Company	———	1

Earnings Information Reported by Graduates from Ryder's National Professional Truck Driver Training Course

	Jan/June 1974
Graduates beginning at hourly rates between $3.00 and $3.99	3
Graduates beginning at hourly rates between $4.00 and $4.99	4
Graduates beginning at hourly rates between $5.00 and $5.99	7
Graduates responding to inquiry about employment but declining to disclose earnings	16

APPENDIX C

Dear Sir or Madam:

Under an order of the U. S. Federal Trade Commission, agreed to by us and effective as of [insert effective date], you are requested to fill out *in full* the enclosed affidavit questionnaire. You are also requested to sign it; swear to it before a notary

public or other person authorized to witness sworn statements in your state, and return it in the enclosed stamped, self-addressed envelope.

The Federal Trade Commission has found that the collection of the information requested by this letter and the enclosed affidavit questionnaire is necessary to carry out a Federal Trade Commission order. Among other things, the order requires us to make certain tuition adjustments for certain former students who finished the resident training part of our tractor-trailer driver course during 1970, 1971 or 1972 or our heavy equipment operator course during 1971, 1972 or 1973.

You are under no obligation to fill out or return the enclosed affidavit questionnaire. But your qualifications for any possible tuition adjustment will not be considered unless you fill out the affidavit questionnaire and we receive it no later than [the date set forth in part III, paragraph 9(d) of this order].

If you fill out the affidavit questionnaire, please fill it out completely and truthfully. Answer *all* the applicable questions and answer them with the same care you would use in preparing a tax return, registering a motor vehicle, or undertaking any other serious matter.

Keep in mind that you can be exposed to criminal penalties if you knowingly give false information.

DIRECTIONS: Please *answer every question that applies to you* in the affidavit questionnaire. Make your answers *complete and truthful.*

After you have answered every applicable question in the affidavit questionnaire, do *not* sign the affidavit questionnaire. Take it to a notary public or other person authorized to witness sworn statements in your state. Then sign and swear to the affidavit questionnaire in the presence of that person. He or she will then notarize it.

Please return the filled out, signed and notarized affidavit questionnaire in the enclosed stamped, self-addressed envelope. MAIL IT EARLY ENOUGH TO REACH US BY [the date set forth in part III, paragraph 9(d) of this order]. If you should misplace the enclosed envelope, please mail the affidavit questionnaire to the [name and address on the return envelope].

Thank you for your cooperation.

Sincerely,
James M. Herron
Vice President and Secretary
Ryder System, Inc.

Enclosure

APPENDIX D

[Tractor-trailer form]

UNITED STATES OF AMERICA BEFORE THE FEDERAL TRADE COMMISSION

In re
Ryder System, Inc., et al.,

Docket No. C–2915

AFFIDAVIT OF [*Give your name*]
COUNTY OF [*Give County where Affidavit is notarized*]
STATE OF [*Give State where Affidavit is notarized*]

[*Give your name*], being duly sworn, deposes and answers the questions listed below as follows:

[PLEASE TYPE OR CAREFULLY PRINT ALL YOUR ANSWERS.]

1. Did you ever take Ryder's tractor-trailer driver course? ☐ YES ☐ NO

1A. If your answer to Question 1 was NO but you took and finished *all* of the resident training part of Ryder's heavy equipment operator course during 1971, 1972 or 1973, and you want to get an affidavit questionnaire similar to this one, but relating to the heavy equipment operator course, check here ☐, and skip to Question 14. Answer Question 14 and return this document in the enclosed postage paid envelope *without having it notarized.* You will get an affidavit on the heavy equipment operator course.

2. Did you finish *all* of the resident training part of the course? ☐ YES ☐ NO

(If your answer to Question 2 was YES, then please give *full* answers to *all* of the remaining questions that apply to you.

(If your answer to Question 2 was NO, skip to Question 14; don't answer Question 2A through Question 13; sign this document and return it in the enclosed postage paid envelope *without having it notarized.*)

2A. Where did you take the resident training part of the course? *[Give location of the resident training center]*

2B. Did you finish the resident training part of the course during 1970, 1971 or 1972? ☐ YES ☐ NO

When did you finish it? *[Give month and year when you finished the resident training part of the course]*

(If your answer to Question 2B was YES, then please give *full* answers to *all* of the remaining questions that apply to you.

If your answer to Question 2B was NO, then skip to Question 14; do not answer Questions 3 through 13; sign this document and return it in the enclosed postage paid envelope *without having it notarized.*)

3. How old were you when you finished the resident training part of the course? _____ years old. I was born on *[Give date of birth]*

4. When you first began the *home study* part of the course:

(a) Did you then have a job in the trucking industry? ☐ YES ☐ NO

If you then had a job in the trucking industry, what job did you hold? *[Give the job you held]*

(b) Did you then have a job in some other field? ☐ YES ☐ NO

What field? *[Give the field in which you then had a job]*

What job did you hold? *[Give the job which you held]*

(c) Were you unemployed? ☐ YES ☐ NO

(d) Were you a student in some other school? ☐ YES ☐ NO

What sort of school? *[Give type of school in which you were a student]*

5. When you first began the *resident training* part of the course:

(a) Did you then have a job in the trucking industry? ☐ YES ☐ NO

If you then had a job in the trucking industry, what job did you hold? *[Give the job you held]*

If you then held a job in the trucking industry, what company did you work for? *[Give the name of the company]*

(b) Did you then have a job in some other field? ☐ YES ☐ NO

What field? *[Give the field in which you then had a job]*

What job did you have? *[Give the job you held]*
(c) Were you unemployed? ☐ YES ☐ NO

(d) Were you a student in some other school? ☐ YES ☐ NO

What sort of school? *[Give the type of school in which you were a student]*
6. What was the *most important* reason or reasons for which you took a truck driving course? [LOOK OVER *ALL* OF THE REASONS BELOW AND THEN PUT A CHECK MARK (X) NEXT TO THE MOST IMPORTANT REASON OR REASONS. YOU CAN CHECK MORE THAN ONE REASON.]
(a) I wanted to make use of Veterans Administration education benefits. _____
(b) I wanted to learn tractor-trailer driver skills but not for purposes of finding employment in the trucking industry. _____
(c) I wanted to find employment as a truck driver. _____
(d) I wanted to learn trucking skills in order to become an owner-operator in the trucking industry. _____
(e) I was already a truck driver and I took the course to improve my driving skills so I might qualify for advancement. _____
(f) I wanted to _____
[Give the most important reason for which you took the course if it was none of the reasons given in (a) through (e)]

7. What was the total tuition cost for the home study and resident training parts of the course? (Do not include interest charges.) $ _____ *[Give total or approximate tuition cost]*
7A. Did a governmental agency other than the Veterans Admistration — for example, a Job Corps agency or a manpower rehabilitation agency — pay any part of this tuition? ☐ YES ☐ NO

If so, how much? $ _____ *[Give amount which government agency other than VA paid. Do not give amount which VA paid]*
7B. Did your employer pay any part of this tuition? ☐ YES ☐ NO

If so, how much $ _____ *[Give amount which you recall your employer paid]*
7C. If your employer paid any part of this tution, did you have any obligation to repay your employer? ☐ YES ☐ NO

If so, how much of the tuition amount paid by your employer have you repaid to your employer? $ _____ *[Give amount which you recall you repaid]*
Are you obligated to repay any of this tuition amount to your employer in the future? ☐ YES ☐ NO

If so, how much are you obligated to repay to your employer in the future? $ _____ *[Give amount which you are obligated to repay]*
8. Did you ever get a full or partial refund of the tuition for the course from Ryder? ☐ YES ☐ NO

8A. If your answer to Question 8 is YES, how much in total refunds do you recall getting from Ryder?

_____
[Give total amounts of refunds you recall receiving]
When did you get a refund or refunds from Ryder?

_____
[Give month and year of refund or refunds, if known]

Why did you get that refund or refunds?

[Give a full explanation of the refund or refunds]

9. After finishing the resident training part of the course, did you make a *serious effort* to find a job as a truck driver, or as a truck driving instructor or as a safety director or foreman of truck drivers? ☐ YES ☐ NO

10. If your answer to Question 9 is YES, then skip to Question 11. If your answer to Question 9 is NO, what was the *most important* reason why you did not make a serious effort to find such a job? [LOOK OVER ALL OF THE REASONS BELOW AND THEN PUT A CHECK MARK (X) NEXT TO THE MOST IMPORTANT REASONS. CHECK ONLY ONE.]

(a) I was then holding a different job and I did not want to switch. _____
(b) I decided I did not want to be a truck driver. _____
(c) I preferred a job in another field. _____
(d) I decided that I did not want to work in the trucking industry. _____
(e) I decided to operate my own truck as an owner-operator. _____
(f) I was drafted or I enlisted in the military service. _____
(g) I decided to go to another school or to stay in another school. _____
(h) My family responsibilities prevented me from looking for such a job. _____
(i) I did not make a serious effort to find such a job for a different reason, that is:

[Explain fully]

11. If, after finishing the resident training part of the course, you *did* make a serious effort to find a job as a truck driver, or as a truck driving instructor or as a safety director or foreman of truck drivers, ANSWER *ALL* PARTS OF THIS QUESTION *AS PRECISELY AS POSSIBLE.* IF NECESSARY USE THE BLANK PAGES ATTACHED TO THIS AFFIDAVIT QUESTIONNAIRE TO FINISH YOUR ANSWER.

(a) After you finished the resident training part of the course, did you *personally visit* any trucking companies or any other companies that hire truck drivers *for the purpose of getting a job as a truck driver?* ☐ *YES* ☐ *NO*

(b) If your answer to Question 11(a) is YES, what is the *total number* of companies you *personally visited for the purpose of getting a job as a truck driver?*

[Give the total number of companies which you personally visited for the purpose of getting a job as a truck driver]

(c) Give the names and locations of the companies that you *recall* personally visiting for the purpose of getting a job as a truck driver.

Name of Company *Location*

(d) Of the total number of companies listed in answer to Question 11(b), at how many of the companies did you *fill out a job application?*

[Give the total number of companies at which you filled out a job application]

(e) If you did not fill out a job application at all of the companies you personally visited, *why not?* USE THE BLANK PAGES AT THE END OF THIS AFFIDAVIT QUESTIONNAIRE IF NECESSARY TO FINISH YOUR ANSWER.

(f) Of the total number of companies listed in answer to Question 11(b), at how many such companies did you have a personal interview?

[Give the total number of companies at which you had a personal interview]

(g) If you did not have a personal interview at all of the companies which you personally visited, *why not*? USE THE BLANK PAGES AT THE END OF THIS AFFIDAVIT QUESTIONNAIRE IF NECESSARY TO COMPLETE YOUR ANSWER.

(h) After you made the personal visits to companies which you have described in answer to Questions 11(a) through 11(g), did you ever make a *second personal visit* to any of these companies for the purpose of obtaining employment? ☐ YES ☐ NO

(i) If your answer to Question 11(h) is YES, at *how many* companies did you make a second personal visit for the purpose of obtaining employment as a truck driver?

[Give the number of companies which you personally visited a second time for the purpose of obtaining employment as a truck driver]

(j) If your answer to Question 11(h) is YES, give the names of the companies that you *recall* personally visiting for a *second time* for the purpose of getting a job as a truck driver.

Name of Company

(k) After you completed the resident training portion of the course, did you seek employment as a truck driver or as a truck driving instructor or as safety director or foreman of truck drivers by making *telephone calls* to potential employers? ☐ YES ☐ NO

(l) If your answer to Question 11(k) is YES, then how many *telephone calls* did you make in the course of your efforts to seek such employment? (Do not include any of the companies you personally visited.)

[Give number of companies at which you sought employment by telephone]

(m) If your answer to Question 11(k) is YES, then what were the names and locations of the companies which you *recall* telephoning in the course of your efforts to seek such employment? (Do not include any of the companies you personally visited.)

Name of Company *Location*

(n) After personally visiting companies for the purposes of obtaining employment as a truck driver or as a truck driving instructor or as safety director or foreman of truck drivers, did you make any *follow-up telephone calls* to any of those companies? ☐ YES ☐ NO

(o) If your answer to Question 11(n) is YES, then how many *follow-up telephone calls* did you make to any companies you had personally visited?

[Give number of companies to whom you made follow-up telephone calls after personal visits]

(p) If your answer to Question 11(n) is YES, then what were the names of the companies to which you *recall* making *follow-up telephone calls*, after personal visits, for the purpose of seeking employment?

Name of Company

(q) After you completed the resident training part of the course, and after you had made some search for a job as a truck driver or as a truck driving instructor or as safety director or foreman of truck drivers, did you ever *contact Ryder's resident training center for more* help in finding a job? ☐ YES ☐ NO

(r) If you did contact Ryder's resident training center for more help, *which* Ryder resident training center did you contact?

[Give the location of the Ryder resident training center which you contacted for additional assistance]

(s) After you finished the resident training portion of the course, and after you had made some search for a job as a truck driver or as a truck driving instructor or as safety director or foreman of truck drivers, did you ever contact *any Ryder people other than the people at a resident training center* for more help in finding a job? ☐ YES ☐ NO

(t) If your answer to Question 11(s) is YES, what advice or assistance were you given? GIVE A FULL ANSWER. IF NECESSARY USE THE BLANK PAGES

ATTACHED TO THIS AFFIDAVIT QUESTIONNAIRE TO COMPLETE YOUR ANSWER.

12(a). As a result of your trying to find a job, as described in response to Question 11, were you ever offered a job:

(i) as a tractor-trailer driver? ☐ YES ☐ NO

(ii) as a truck driving instructor? ☐ YES ☐ NO

(iii) as a manager or safety director or foreman of truck drivers? ☐ YES ☐ NO

(iv) If you were *not* offered such a job, please explain why. GIVE A FULL ANSWER. IF NECESSARY USE THE BLANK PAGES ATTACHED TO THIS AFFIDAVIT QUESTIONNAIRE TO COMPLETE YOUR ANSWER.

(b) If your answer to Question 12(a)(i) (ii) or (iii) is YES, did you actually start work on any such job you were offered? ☐ YES ☐ NO

(c) If your answer to Question 12(b) is NO, explain in detail why you did not actually start work on any such job.

13. *At any time* between the end of your resident training and today, have you ever worked as a:

(a) truck driver? ☐ YES ☐ NO

(b) truck driving instructor? ☐ YES ☐ NO

(c) safety director or formean of truck drivers? ☐ YES ☐ NO

14. My present home address is:

Number	Street	Apartment
City	State	Zip Code

My home telephone is:
Area Code: _____
Number: _____
My present business address is:

Employer's Name

Number	Street	
City	State	Zip Code

My business telephone number is:
Area Code: _____
Number: _____
My present job is:

Please give the name, home address and telephone number of a person who would know your home address at all times:

[Name of person who would know your address at all times]

Number	Street	Apartment
City	State	Zip Code

Telephone Area Code Telephone Number

My Social Security number is: _____
My Ryder student identification number was: _____
[Give number if known]

_____
Signature
[PLEASE READ THE ACCOMPANYING LETTER BEFORE SIGNING]

Subscribed and sworn to before me this
_____ day of _____, _____
_____
Notary Public
My Commission Expires: _____

WARNING: It is a federal crime for anyone to knowingly and willfully make a false, fictitious, or fraudulent statement or representation in any matter within the jurisdiction of any department or agency of the United States. 18 U.S.C. 1001.

APPENDIX E

[heavy equipment form]

UNITED STATES OF AMERICA

BEFORE THE FEDERAL TRADE COMMISSION

In re
Ryder System, Inc., et al.,

Docket No. C–2915

AFFIDAVIT OF [*Give your name*]
COUNTY OF [*Give County where Affidavit is notarized*]
STATE OF [*Give State where Affidavit is notarized*]

[*Give your name*], being duly sworn, deposes and answers the questions listed below as follows:

[PLEASE TYPE OR CAREFULLY PRINT ALL YOUR ANSWERS.]

1. Did you ever take Ryder's heavy equipment operator course? ☐ YES ☐ NO

1A. If your answer to Question 1 was NO but you took and finished *all* of the resident training part of Ryder's tractor-trailer driver course during the years 1970, 1971 or 1972, and you want to get an affidavit questionnaire similar to this one, but relating to the tractor-trailer driver course, check here ☐, and skip to Question 16. Answer Question 16 and return the document in the enclosed postage paid envelope *without having it notarized.* You will get an affidavit on the tractor-trailer driver course.

2. Did you finish *all* of the resident training part of the course? ☐ YES ☐ NO

(If your answer to Question 2 was YES, then please give *full* answers to *all* of the remaining questions which apply to you.

If your answer to Question 2 was NO, then skip to Question 16; don't answer Question 2A through Question 15; sign this document and return it in the enclosed postage paid envelope without having it notarized.)

2A. Where did you take the resident training part of the course? [*Give location of the resident training center*]

2B. Did you finish the resident training part of the course during 1971, 1972, or 1973? ☐ YES ☐ NO

When did you do so? *[Give month and year when you finished the resident training part of the course]*

(If your answer to Question 2B was YES, then please give *full* answers to *all* of the remaining questions that apply to you.

If your answer to Question 2B was NO, then skip to Question 16; do not answer Questions 3 through 15; sign this document and return it in the enclosed postage paid envelope *without having it notarized.*)

3. How old were you when you finished the resident training part of the course? I was _____ years old. I was born on *[Give date of birth]*

4. When you first began the *home study* part of the course:

(a) Did you then have a job as a heavy equipment operator? ☐ YES ☐ NO

If you then had a job as a heavy equipment operator, what job did you hold? *[Give the job which you held]* .

(b) Did you then have a job in some other field? ☐ YES ☐ NO

What field? *[Give the field in which you then had a job]*

What job did you hold? *[Give the job which you held]*

(c) Were you unemployed? ☐ YES ☐ NO

(d) Were you a student in some other school? ☐ YES ☐ NO

What sort of school? *[Give type of school in which you were a student]*

5. When you first began the *resident training* portion of the course:

(a) Did you then have a job as a heavy equipment operator? ☐ YES ☐ NO

If you then had a job as a heavy equipment operator, what job did you hold? *[Give the job which you held]*

If you then had a job as a heavy equipment operator, what company did you work for? *[Give the name of the company]*

(b) Did you then have a job in some other field? ☐ YES ☐ NO

What field? *[Give the field in which you then had a job]*

What job did you have? *[Give the job which you held]*

(c) Were you unemployed? ☐ YES ☐ NO

(d) Were you a student in some other school? ☐ YES ☐ NO

What sort of school? *[Give type of school in which you were a student]*

6. What was the *most important* reason or reasons for which you took a heavy equipment course? [LOOK OVER *ALL* OF THE REASONS BELOW AND THEN PUT A CHECK MARK (X) NEXT TO THE MOST IMPORTANT REASON OR REASONS. YOU CAN CHECK MORE THAN ONE REASON.]

(a) I wanted to make use of Veterans Administration education benefits. _____

(b) I wanted to learn heavy equipment operator skills but not for purposes of finding employment as a heavy equipment operator. _____

(c) I wanted to find employment as a heavy equipment operator. _____

(d) I wanted to learn heavy equipment skills in order to become an owner-operator of heavy equipment. _____

(e) I was already a heavy equipment operator and I took the course to improve my skills so I might qualify for advancement. _____

(f) I wanted to _____

[Give the most important reason for which you took the course if it was none of the reasons stated in (a) through (e)]

---

7. What was the total tuition cost for the home study and resident training parts of the course? (Do not include interest charges.) $ _____ *[Give total or approximate tuition cost]*

7A. Did a governmental agency other than the Veterans Administration — for example, a Job Corps agency or a manpower rehabilitation agency — pay any part of this tuition? ☐ YES ☐ NO

If so, how much? $ _____ *[Give amount which government agency other than VA paid. Do not insert amount which VA paid]*

7B. Did your employer pay any part of this tuition? ☐ YES ☐ NO

If so, how much? $ _____ *[Give amount which you recall your employer paid]*

7C. If your employer paid any part of this tuition, did you have any obligation to repay your employer? ☐ YES ☐ NO

If so, how much of the tuition amount paid by your employer have you repaid to your employer? $ _____ *[Give amount which you recall you repaid]*

Are you obligated to repay any of this tuition amount to your employer in the future? ☐ YES ☐ NO

If so, how much are you obligated to repay to your employer in the future? $ _____ *[Give amount which you are obligated to repay]*

8. Did you ever get a full or partial refund of the tuition for the course from Ryder? ☐ YES ☐ NO

8A. If your answer to Question 8 is YES, how much in total refunds do you recall getting from Ryder?

[Give total amounts of refunds you recall receiving]

When did you get a refund or refunds from Ryder?

[Give month and year of refund or refunds, if known]

Why did you get that refund or refunds?

[Give a full explanation of the refund or refunds]

---

9. After finishing the resident training part of the course, did you make a *serious effort* to find a job as a heavy equipment operator or as a heavy equipment operation instructor or as safety director or foreman of persons engaged in heavy equipment operation? ☐ YES ☐ NO

10. If your answer to Question 9 is YES, then skip to Question 11. If your answer to Question 9 is NO, what was the *most important* reason why you did not make a serious effort to find such a job? [LOOK OVER ALL OF THE REASONS BELOW AND THEN PUT A CHECK MARK (X) NEXT TO THE MOST IMPORTANT REASON. *CHECK ONLY ONE.*]

(a) I was then holding a different job and I did not want to switch. _____

(b) I decided I did not want to be a heavy equipment operator. _____

(c) I preferred a job in another field. _____

(d) I decided that I did not want to work as a heavy equipment operator. _____
(e) I decided to operate my own heavy equipment as an owner-operator. _____
(f) I was drafted or I enlisted in the military service. _____
(g) I decided to go to another school or to stay in another school. _____
(h) My family responsibilities prevented me from looking for such a job. _____
(i) I did not make a serious effort to find such a job for a different reason, that is:

_____

[Explain fully]

11. If, after finishing the resident training part of the course, you *did* make a serious effort to find a job as a heavy equipment operator or a heavy equipment operation instructor or as safety director or foreman of persons engaged in heavy equipment operation, ANSWER *ALL* PARTS OF THIS QUESTION *AS PRECISELY AS POSSIBLE.* IF NECESSARY USE THE BLANK PAGES ATTACHED TO THIS AFFIDAVIT QUESTIONNAIRE TO FINISH YOUR ANSWERS.

(a) After you completed the resident training part of the course, did you *personally visit* companies that hire heavy equipment operators *for the purpose of getting a job* as a heavy equipment operator? ☐ YES ☐ NO

(b) If your answer to Question 11(a) was YES, what is the *total number* of companies that you personally visited *for the purpose of getting a job as a heavy equipment operator?*

_____

[Give the total number of companies which you personally visited for the purpose of getting a job as a heavy equipment operator]

(c) Give the names and locations of the companies that you *recall* personally visiting for the purpose of getting a job as a heavy equipment operator.

Name of Company *Location*

(d) Of the total number of companies listed in answer to Question 11(b), at how many such companies did you *fill out a job application?*

_____

[Give the total number of companies at which you filled out a job application]

(e) If you did not fill out a job application at all of the companies which you personally visited, *why not?* USE THE BLANK PAGES AT THE END OF THIS AFFIDAVIT QUESTIONNAIRE IF NECESSARY TO COMPLETE YOUR ANSWER.

(f) Of the total number of companies listed in answer to Question 11(b), at how many such companies did you have a personal interview?

_____

[Give the total number of companies at which you had a personal interview]

(g) If you did not have a personal interview at all of the companies which you personally visited, *why not?* USE THE BLANK PAGES AT THE END OF THIS AFFIDAVIT QUESTIONNAIRE IF NECESSARY TO COMPLETE YOUR ANSWER.

(h) After you made the personal visits to companies which you have described in answer to Questions 11(a) through 11(g), did you ever make a *second personal visit* to any of these companies for the purpose of obtaining employment? ☐ YES ☐ NO

(i) If your answer to Question 11(h) is YES, at *how many* companies did you make a second personal visit for the purpose of obtaining employment as a heavy equipment operator?

_____

[Give the number of companies which you personally visited a second time for the purpose of obtaining employment as a heavy equipment operator]

(j) If your answer to Question 11(h) is YES, give the names of the companies that you *recall* personally visting for a *second time* for the purpose of getting a job as a heavy equipment operator.

Name of Company

(k) After you completed the resident training portion of the course, did you seek employment as a heavy equipment operator or a heavy equipment operation instructor or as safety director or foreman of persons engaged in heavy equipment operation by making *telephone calls* to potential employers? ☐ YES ☐ NO

(l) If your answer to Question 11(k) is YES, then how many *telephone calls* did you make in the course of your efforts to seek such employment? (Do not include any of the companies you personally visited.)

_____

[Give number of companies at which you sought employment by telephone]

(m) If your answer to Question 11(k) is YES, then what were the names and locations of the companies which you recall telephoning in the course of your efforts to seek such employment?
(Do not include any of the companies you personally visited.)

Name of Company *Location*

(n) After personally visiting companies for the purpose of obtaining employment as a heavy equipment operator or as a heavy equipment operation instructor or as safety director or foreman of persons engaged in heavy equipment operation, did you make any *follow-up telephone calls* to any of those companies? ☐ YES ☐ NO

(o) If your answer to Question 11(n) is YES, then how many *follow-up telephone calls* did you make to any companies you had personally visited?

[Give number of companies to which you made follow-up telephone calls after personal visits]

(p) If your answer to Question 11(n) is YES, then what were the names of the companies to which you *recall* making *follow-up telephone calls*, after personal visits, for the purpose of seeking employment?

Name of Company

12. (a) After you finished the resident training part of the course, did you *personally visit* any union hiring halls *for the purpose of getting a job* as a heavy equipment operator? ☐ YES ☐ NO

(b) If your answer to Question 12(a) was YES, what is the *total number* of union hiring halls which you personally visited for the *purpose of getting a job as a heavy equipment operator?*

[Give the total number of union hiring halls which you personally visited for the purpose of getting a job as a heavy equipment operator.]

(c) List the names and locations of the union hiring halls you recall personally visiting for the purpose of getting a job as a heavy equipment operator.

Name and Number of Union *Location of Hiring Hall*

(d) Of the total number of union hiring halls listed in answer to Question 12(b), at how many such halls did you *fill out an application for membership?*

[Give the total number of union hiring halls at which you filled out an application for membership.]

(e) If you did not fill out an application at all of the union hiring halls which you personally visited, *why not?* USE THE BLANK PAGES AT THE END OF THIS AFFIDAVIT QUESTIONNAIRE IF NECESSARY TO FINISH YOUR ANSWER.

(f) Of the total number of union hiring halls listed in asnwer to Question 12(b), at how many of them did you have a *personal interview* with a business agent or other union official?

[Give the total number of union hiring halls at which you had a personal interview]

(g) If you did not have a personal interview at all of the union hiring halls you personally visited, *why not?* USE THE BLANK PAGES AT THE END OF THIS AFFIDAVIT QUESTIONNAIRE IF NECESSARY TO COMPLETE YOUR ANSWER.

(h) After you made the personal visits to the union hiring hall, which you have described in answer to Questions 12(a) through 12(g), did you ever make a *second personal visit* to any of these union hiring halls for the purpose of getting a job? ☐ YES ☐ NO

(i) If your answer to Question 12(h) was YES, at *how many* union hiring halls did you make a *second* personal visit for the purpose of getting a job as a heavy equipment operator?

[Give the number of union hiring halls which you personally visited a second time for the purpose of obtaining employment as a heavy equipment operator.]

(j) If your answer to Question 12(h) was YES, list the names and locations of the union hiring halls which you recall personally visiting for a *second time* for the purpose of getting a job as a heavy equipment operator.

Name and Number of Union *Location of Hiring Hall*

(k) After you finished the resident training part of the course, did you try to get a job as a heavy equipment operator or as a heavy equipment operation instructor, or as safety director or foreman of persons engaged in heavy equipment operation by making *telephone calls* to union hiring halls? ☐ YES ☐ NO

(l) If your answer to Question 12(k) was YES, then how many *telephone calls* did you make in the course of your efforts to get such a job? (Do not include any of the union hiring halls visited.)

[Give number of union hiring halls at which you tried to get a job by telephone.]

(m) If your answer to Question 12(k) was YES, then what were the names and locations of the union hiring halls which you recall telephoning in the course of your efforts to get a job? (Do not include any of the union hiring halls you personally visited.)

Name and Number of Union *Location of Hiring Hall*

(n) After personally visiting union hiring halls to get a job as a heavy equipment operator or as a heavy equipment operation instructor or as safety director or foreman of persons engaged in heavy equipment operation, did you make any *follow-up telephone calls* to any of those union hiring halls? ☐ YES ☐ NO

(o) If your answer to Question 12(n) was YES, then how many *follow-up telephone calls* did you make to any union hiring halls you had personally visited?

[Give number of union hiring halls to which you made follow-up telephone calls after personal visits.]

(p) If your answer to Question 12(n) was YES, then what were the names and locations of the union hiring halls to which you recall making *follow-up telephone calls*, after personal visits, to try to get a job?

Name and Number of Union *Location of Hiring Hall*

13(a) After you finished the resident training part of the course, and after you had tried to find a job as a heavy equipment operator or as a heavy equipment operation instructor or as safety director or foreman of persons engaged in heavy equipment operation, did you ever *contact Ryder's resident training center* for more help in finding a job? ☐ YES ☐ NO

(b) If you did contact Ryder's resident training center for additional help, *which* Ryder resident training center did you contact?

[Give the location of the Ryder resident training center which you contacted for additional help]

(c) After you finished the resident training part of the course, and after you had made some search for a job as a heavy equipment operator or as a heavy equipment operation instructor or as safety director or foreman of persons engaged in heavy equipment operation, did you ever contact *any Ryder personnel other than personnel at a resident training center* for additional help in finding a job? ☐ YES ☐ NO

(d) If your answer to Question 13(c) was YES, what advice or help did you get? GIVE A FULL ANSWER. IF NECESSARY USE THE BLANK PAGES ATTACHED TO THIS AFFIDAVIT QUESTIONNAIRE TO COMPLETE YOUR ANSWER.

14(a) As a result of your trying to get a job as described in your response to Questions 11, 12, and 13, were you ever offered a job?

(i) as a heavy equipment operator? ☐ YES ☐ NO

(ii) as an instructor of heavy equipment operation? ☐ YES ☐ NO

(iii) as a manager or safety director or foreman of persons in heavy equipment operation? ☐ YES ☐ NO

(iv) If you were not offered such a job, please explain why. GIVE A FULL ANSWER. IF NECESSARY USE THE BLANK PLAGES ATTACHED TO THIS AFFIDAVIT QUESTIONNAIRE TO COMPLETE YOUR ANSWER.

(b) If your answer to Question 14(a) (i) (ii) or (iii) was YES, did you actually start work on any such job you were offered? ☐ YES ☐ NO

(c) If your answer to Question 14(b) was NO, explain in detail why you did not actually start on any such job.

15. At any time between the end of your resident training and today, have you ever held a job *for more than one day* as a:

(a) heavy equipment operator? ☐ YES ☐ NO

(b) instructor of heavy equipment operation? ☐ YES ☐ NO

(c) safety director or foreman of persons engaged in heavy equipment operation? ☐ YES ☐ NO

(d) If your answer to Question 15(a), (b), or (c) was YES, how long did you hold such a job?

16. My present home address is:

Number	Street	Apartment
City	State	Zip Code

My home telephone number is:
Area Code: _____
Number: _____
My present business address is:

Employer's Name

Number Street

City State Zip Code

My business telephone number is:
Area Code: _____
Number: _____
My present job is:

Please give the name, home address and telephone number of a person who would know your home address at all times:

[Name of person who would know your address at all times]

Number Street Apartment

City State Zip Code

Telephone Area Code Telephone Number

My Social Security number is: _____
My Ryder student identification number was: _____
[Give number if known]

_____
Signature
[PLEASE READ THE ACCOMPANYING LETTER BEFORE SIGNING]

Subscribed and sworn to before me this
_____ day of _____, _____
_____ Notary Public
My Commission Expires: _____

WARNING: It is a federal crime for anyone to knowingly and willfully make a false, fictitious, or fraudulent statement or representation in any matter within the jurisdiction of any department or agency of the United Sates. 18 U.S.C. 1001.

APPENDIX F

IMPORTANT NOTICE

(Name)
(Address)
(Telephone Number)

Dear (Name):

This letter relates to the affidavit questionnaire (attached) which you returned to us. A review of your answers to the questionnaire shows that your answers to

Questions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16 appear to be inconsistent with your answers to Questions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16. (Note circled answers).

It is necessary, before we and the Federal Trade Commission can complete our determination of whether or not you qualify for a tuition adjustment, that you clarify the answer(s) *by using the blank sheet of paper attached to the back of your questionnaire.*

Your explanation must be *truthful* and *complete.* You should be aware that, although your explanation need not be notarized, you can be subjected to the same criminal penalties for an untruthful answer as in the affidavit. 18 U.S.C. 1001.

Your affidavit, with your explanation inserted on the blank sheet attached to it, must be received no later than [insert date set forth in Part III, paragraph 10(e) of this order] or it cannot be considered for purposes of determining whether or not you qualify for a tuition adjustment. Return your affidavit, with your explanation, in the enclosed, postage prepaid envelope.*

By: _____

Enclosures

APPENDIX G

IMPORTANT NOTICE

(Name)
(Address)
(Telephone Number)

Dear (Name)

This letter relates to the affidavit questionnaire (attached) which you returned to us. A review of your answers to the questionnaire shows that your answer(s) to Questions: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 appear to be unclear or non-responsive. (Note circled answers.)

It is necessary, before we and the Federal Trade Commission can complete our determination of whether or not you qualify for a tuition adjustment, that you clarify the answer(s) *by using the sheet of paper attached to the back of your questionnaire.*

Your explanation must be *truthful* and *complete.* You should be aware that, although your explanation need not be notarized, you can be subjected to the same criminal penalties for an untruthful answer as in the affidavit. 18 U.S.C. 1001.

Your affidavit, with your explanation inserted in the blank sheet attached to it, must be received no later than [insert date set forth in Part III, Paragraph 10(e) of this order] or it cannot be considered for purposes of determining whether your qualify for a tuition adjustment. Return your affidavit, with your explanation, in the enclosed, postage prepaid envelope.*

By: _____

Enclosures

* If you should misplace the enclosed, postage prepaid envelope, mail your affidavit and explanation in an envelope addressed to [independent contractor's address].

* If you should misplace the enclosed, postage prepaid envelope, mail your affidavit and explanation in an envelope addressed to [independent contractor's address].

APPENDIX H

IMPORTANT NOTICE

(Name)
(Address)
(Telephone Number)

Dear (Name):

This letter relates to the affidavit questionnaire (attached) which you returned to us. A review of your questionnaire showed that the following circled questions were not answered: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16. (Note circled answers.)

It is necessary, before we and the Federal Trade Commission can complete our determination of whether or not you qualify for a tuition adjustment, *that the unanswered questions are answered by you in the appropriate places on the enclosed questionnaire.*

Your answers must be *truthful* and *complete.* You should be aware that although your answers need not be notarized, you can be subjected to the same criminal penalties for an untruthful answer as in the affidavit. 18 U.S.C. 1001.

Your affidavit, with the circled questions answered in the appropriate places, must be received no later than [insert date set forth in Part III, paragraph 10(e) of this order] or it cannot be considered for purposes of determining whether or not you qualify for a tuition adjustment. Return your affidavit, with your answers, in the enclosed, postage prepaid envelope.*

By: _____

Enclosures

APPENDIX I

SPECIAL ARBITRATION RULES FOR

NEGOTIATED CONSENT ORDER (DOCKET NO. C-2915)

BETWEEN THE FEDERAL TRADE COMMISSION AND RYDER

SYSTEM, INC. FOR ARBITRATION THROUGH THE AMERICAN

ARBITRATION ASSOCIATION

I. *Initiation of Arbitration*

With respect to each potentially eligible graduate, for purposes of a tuition adjustment, as the term "potentially eligible graduate" is defined in part III, paragraph 14(c) of the above-captioned order (hereinafter "order"), Ryder System, Inc. (hereinafter "respondent") shall initiate an arbitration proceeding within the time specified in part III, paragraph 15(b) of the order, by sending to [name and address of the representative of the American Arbitration Association (hereinafter "AAA")] the following information and documents in duplicate:

* If you should misplace the enclosed, postage prepaid envelope, mail your affidavit with your answers in an envelope addressed to [independent contractor's address].

(1) A " Demand for Arbitration" in the language, manner, and form shown herein as Appendix J.

(2) A copy of the claimant affidavit, as defined in part III, paragraph 7 of the order, and a copy of all other documents previously submitted to respondent by the potentially eligible graduate in connection with any of the provisions of part III of the order.

(3) A notarized affidavit in which respondent asserts that it believes it has a reasonable basis for denying a partial tuition refund to said Claimant and arbitrating the matter pursuant to the provisions of part III of the order, and that it desires to place the issue in arbitration, which affidavit shall be supported by one or more of the following:

(i) A sworn affidavit based on first hand knowledge asserting facts controverting material facts set forth in the claimant affidavit or other documents submitted to respondent by the potentially eligible graduate in connection with any of the provisions of part III of the order.

(ii) Documentary evidence, fully identified as to source, date, and other material facts pertaining thereto, which controvert material facts in the claimant affidavit on which the Federal Trade Commission bases its claim that the potentially eligible graduate is a person described in part III, paragraphs 9(a) through 9(f) of the order.

(iii) Reference to the provisions of respondent's Initial Compliance Report which authorize arbitration in the absence of the materials described in subparagraphs I(3)(i) or (ii) above.

(4) A copy of part III, paragraphs 9 through 15 and 26 of the order, and the Initial Compliance Report.

II. *Appointment of Arbitrator*

With respect to each matter for which a Demand for Arbitration is submitted, AAA shall appoint an arbitrator to arbitrate said dispute, and shall appoint another arbitrator whenever an appointed arbitrator is unable to serve promptly. All such arbitrators appointed by AAA, including any such arbitrators employed by AAA, shall be persons qualified by AAA as arbitrators.

III. *Determination by Arbitrator as to Whether Respondent Has A Reasonable Basis for Demanding Arbitration*

Upon receipt of the Demand for Arbitration from respondent, the arbitrator shall examine the accompanying affidavits and documents described in part I of these rules and shall determine whether there is any factual basis for putting through arbitration respondent's claim that the potentially eligible graduate is not a person described in part III, paragraphs 9(a) through 9(f) of the order. In making the determination the arbitrator shall be limited to and bound by the standards and definitions of part III, paragraphs 9 through 15 and 26 of the order, and the Initial Complaince Report. If the arbitrator decides that the demand for arbitration by respondent is inconsistent with part III, paragraphs 9 through 15 and 26 of the order, and the Initial Compliance Report, he shall so inform respondent by letter and shall close the case if respondent, within ten (10) days after receipt of said letter, fails to provide the arbitrator with material facts which demonstrate that arbitration would not be inconsistent with part III, paragraphs 9 through 15 and 26 of the order, and the Initial Compliance Report.

IV. *Evidence by Filing of Documents*

All evidence submitted by parties to the arbitrated dispute shall consist of written information or documents. No oral testimony shall be accepted.

V. *Relevancy and Materiality of Evidence*

The arbitrator shall be the sole judge of the relevancy and materiality of the evidence offered.

VI. *Transmittal of Evidence to Opposing Party*

Upon determining that respondent's request for arbitration is not inconsistent with part III, paragraphs 9 through 15 and 26 of the order, and the Initial Compliance Report, pursuant to part III of these rules, the arbitrator shall mail to the potentially eligible graduate copies of respondent's Demand for Arbitration and all documents submitted to the arbitrator by respondent.

VII. *Submission of Rebuttal and Additional Evidence*

Within fifteen (15) days after receiving copies of said documents referred to in part I of these rules, the potentially eligible graduate may submit to the arbitrator any information or documents which he or she believes are relevant to rebut respondent's claim that he or she is not a person described in part III, paragraphs 9(a) through 9(f) of the order and is, therefore, not eligible for a partial tuition adjustment. The arbitrator shall immediately mail copies of all such information and documents to respondent and respondent shall have the right to respond within seven (7) days after receipt of such information and documents.

The arbitrator may request such additional evidence as he or she deems necessary from either party before closing the arbitration and shall allow said party seven (7) days after receipt of said request to provide such evidence.

VIII. *Arbitrator's Decision*

With respect to each arbitration proceeding, and on the basis of evidence received pursuant to these rules, the arbitrator shall render his or her decision within ten (10) days after said arbitration proceeding is closed, by AAA mailing a notice of his or her decision to both parties without including in said notice any detailed findings of fact or opinion, and said decision shall be limited to and shall be final and binding on both parties with respect to whether the potentially eligible graduate is a person described in part III, paragraphs 9(a) through 9(f) of the order. The decision shall not be made solely on the failure of a party to submit rebuttal evidence or evidence requested.

IX. *Burden of Proof*

Respondent, in all cases referred to arbitration pursuant to part III, paragraph 15 of the order, shall carry the burden of proof to establish that a potentially eligible graduate is not a person described in part III, paragraphs 9(a) through 9(f) of the order.

X. *General Provisions*

A. To the extent not inconsistent with these special rules, the Commerical Arbitration Rules of AAA shall apply to proceedings under these rules.

B. Either party may have evidence submitted under these rules by an attorney representing said party. However, use of an attorney is not required.

XI. *Costs*

A. The administrative fee payable to the AAA for each matter submitted to arbitration shall be $50.00. When respondent demands arbitration, it shall tender said fee with its Demand for Arbitration.

XII. Nothing in these Rules shall invalidate or restrict any right or remedy of any consumer under any State or Federal law.

APPENDIX J

DEMAND FOR ARBITRATION THROUGH THE AMERICAN ARBITRATION ASSOCIATION

Date _____

TO: (Name of potentially eligible graduate) _____
(Address) _____
(City and State) _____ (Zip Code) _____

Through: American Arbitration Association
140 West 51st Street
New York, New York 10020
Attn: Mr. Michael Hollering

From: Ryder System, Inc.
_____
_____

After reviewing the affidavit you submitted and other information you submitted, if any, Ryder System, Inc. ("Ryder") has decided that you do *not* qualify for a partial tuition refund under the terms of the Consent Order (Docket No. C–2915) between the Federal Trade Commission and Ryder. Therefore, pursuant to the Consent Order, Ryder has submitted this matter to arbitration.

Ryder believes you do not qualify for a partial tuition refund for the following reasons (as more fully explained in the enclosed affidavit executed by Ryder):

_____

A copy of the affidavit you submitted and a copy of any other information you submitted to Ryder is enclosed.

Also enclosed are the following documents:

(1) Ryder's affidavit, with supporting documents, explaining why Ryder believes you are not eligible for a partial tuition refund.

(2) A copy of the Special Arbitration Rules which the arbitrator will use in deciding whether you qualify for a partial tuition refund.

In deciding whether or not you are entitled to a partial tuition refund, the arbitrator will review copies of the enclosed documents plus any additional information you provide.

If you wish to provide the arbitrator with any information in regard to your entitlement to a partial tuition adjustment, you must provide him or her (either personally or through an attorney) with such information within fifteen (15) days from the date you receive this notice. You may send to the arbitrator, *in writing,* any of the following types of information.

(1) An explanation of any statement you made in your affidavit or any statement you made in another document you submitted to Ryder;

(2) Any additional information you believe is significant, or copies of any documents you believe are significant, in regard to your eligibility for a partial tuition refund.

(3) A statement contradicting or challenging Ryder's affidavit or supporting documents.

All information submitted to the arbitrator must be in writing. However, *if you have any questions in regard to how this arbitration procedure will work, you may call:* American Arbitration Association, [Area Code] [Telephone Number].

There will be no cost to you for this arbitration proceeding and you are not required to submit any information to the arbitrator.

NOTICE

THE ARBITRATOR MUST RECEIVE ANY INFORMATION YOU DECIDE TO SUBMIT WITHIN FIFTEEN DAYS FROM THE DATE YOU RECEIVE THIS NOTICE.

Carefully review the enclosed copy of your affidavit-questionnaire, Ryder's affidavit, and other enclosed documents submitted by Ryder. Then decide whether you wish to submit any information which may contradict what Ryder has submitted or which in any way may support your claim to a partial tuition refund. Mail any information you wish to submit to:

American Arbitration Association

140 West 51st Street

New York, New York 10020

Attn: Mr. Michael Hollering

APPENDIX K

IMPORTANT NOTICE

(Independent Contractor's
Return Address)

Dear (Name):

Pursuant to an order of the Federal Trade Commission issued on [insert effective date], Ryder System, Inc., has been directed to make certain partial refund payments to certain students who had enrolled in tractor-trailer driving or heavy equipment operations courses previously offered by Ryder.

The order of the Commission contains the provisions identifying the class of persons eligible for partial refunds, and the procedures for making partial refunds. (You may obtain a copy of the order without charge by writing to the Federal Trade Commission, Publications, Room 130, Washington, D.C. 20580. Refer to Ryder System, Inc., Docket No. C–2915.)

In accordance with the provisions of the Order, it has been determined that you are entitled to a partial refund of approximately — percent to — percent of your tuition, which shall be paid in four installments on or before the following dates: [insert the dates set forth in part III, paragraphs 19(a), 20, 21 and 22 of this order].

The order provides that any persons receiving refund payments from Ryder must

agree in writing that, in consideration of such refunds, he or she releases Ryder from any and all further claims, known or unknown, with respect to or arising from tuition for Ryder's course or courses. ACCORDINGLY, NO LATER THAN [insert date twenty (20) days after date set forth in part III, paragraph 16(a) of this order] YOU MUST SIGN AND RETURN TO RYDER A COPY OF THIS LETTER CONFIRMING YOUR AGREEMENT THAT THE REFUND PAYMENTS YOU RECEIVE FROM RYDER WILL BAR YOU FROM MAKING ANY AND ALL CLAIMS AGAINST RYDER RELATING TO YOUR TUITION AT ANY TIME IN THE FUTURE. IF YOU DO NOT SIGN AND RETURN TO RYDER A COPY OF THIS LETTER BY THAT TIME, YOU WILL NOT BE ENTITLED TO ANY REFUND PAYMENT.

Note: To insure receipt of the later refund installments, you should send us written notice of any change in your name or home address.

Note: The order of the Commission does not affect any tuition loan obligations you may have incurred in connection with your attendance at the Ryder school.

Ryder System, Inc.

By _____

RELEASE

IN CONSIDERATION OF THE PARTIAL REFUND PAYMENTS TO BE MADE TO ME PURSUANT TO THE PROVISIONS OF THE ORDER DESCRIBED ABOVE, I HEREBY RELEASE RYDER SYSTEM, INC. AND ALL OF ITS SUBSIDIARIES AND AFFILIATES, FROM ANY AND ALL FURTHER CLAIMS, KNOWN OR UNKNOWN, WITH RESPECT TO OR RELATING TO MY TUITION FOR A RYDER COURSE OR COURSES.

_____

(Signature)

_____

(Date)

Remember, you must return a *signed and dated* copy of this letter no later than [insert date twenty (20) days after date set forth in part III, paragraph 16(a) of this order] to [Independent contractor's address].

IF YOU DO NOT DO SO YOU WILL NOT RECEIVE ANY REFUND PAYMENTS.

APPENDIX L

[If this appendix accompanies the first, second, or third installments, pursuant to part III, paragraphs 19(a), 20 and 21 of this order, then it shall read:]

(Name)
(Address)

Dear (Name):

Enclosed is a check for the amount of the [first, second, third] installment of your partial tuition refund. The next installment will be sent on or before [insert the correct date from among those set forth in part III, paragraphs 20, 21 and 22 of this order].

If you change your name or address please send written notice of the change to [name and address of Ryder or the independent contractor].

By:

[If this appendix accompanies the last installment, pursuant to part III, paragraph 22 of this order, then the appendix shall read:]

(Name)
(Address)

Dear (Name):

Enclosed is a check for the amount of the fourth and last installment of your tuition refund. It will no longer be necessary for you to notify us of a change in your name or address.

By:

APPENDIX M

[Respondent's or independent contractor's address]

(Name)
(Address)

Dear (Name):

Ryder System, Inc. has a check which it is attempting to deliver to (name of refund recipient). If you know his (or her) current address, please send us that information. You may send his (or her) current address by writing it on the bottom of this letter or on a separate piece of paper and mailing it to the above address as soon as possible.

By:

Current Address: _____
_____
_____

APPENDIX N

(Name)
(Address)

Dear (Name):

Pursuant to an order of the Federal Trade Commission, agreed to by this company and effective as of [insert effective date], you are requested to provide us with the last known address of [*insert name of graduate*].

It is believed that this person graduated from a Ryder home study-resident training course. The Federal Trade Commission had determined that the collection of certain information from certain Ryder graduates is necessary in order to implement the terms of a Federal Trade Commission order which, among other things, requires the company to make certain tuition adjustments for certain graduates, possibly including the person listed above.

If you know the current address of the person listed above (whose name is underlined above), please list it in the spot provided at the bottom of this page and return it to us in the enclosed postage prepaid envelope as soon as possible.

(current address of person listed above)

Your cooperation will be appreciated.

Sincerely,

James M. Herron
Vice President and Secretary
Ryder System, Inc.

ADVISORY OPINIONS

Modular housing, meeting certain home construction standards, is not a "consumer product" under the terms of section 101(1); and a mobile home manufacturer who simply passes on warranties offered by the manufacturers of equipment installed in a mobil home is not a "warrantor" under the terms of section 110(f) of the Magnuson-Moss Warranty Act (15 U.S.C. 2301 *et seq.*) (File No. 773 7013). (42 F.R. 37440).

Advisory Opinion Letter

July 13, 1977

Dear Mr. Miller:

This is in reply to your request of September 13, 1976, for an advisory opinion concerning Sections 101(1) and 110(f) of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301 *et seq.,* as they apply to factory-built housing. Your request takes the form of three questions, but because the first one is compound in nature, the Commission has dealt with it as two separate inquiries. Therefore, the questions involved in your request are as follows:

(1) Is a modular house, excluding such items of equipment as air-conditioners, furnaces, and water heaters, a "consumer product" within the meaning of Section 101(1) of the Magnuson-Moss Warranty Act?

(2) Does the classification of a modular house under Section 101(1) of the Magnuson-Moss Warranty Act in any way turn upon whether it is delivered to a real property foundation as a completed structure or in component parts?

(3) Does the classification of a modular house under Section 101(1) of the Magnuson-Moss Warranty Act in any way turn upon whether it is sold first to a builder or instead is sold directly to an ultimate consumer.

(4) Is the manufacturer of a mobile home a "warrantor" for purposes of Section 110(f) of the Magnuson-Moss Warranty Act of such items of equipment as air-conditioners, furnaces, and water heaters if the mobile home manufacturer simply "passes

on" the written warranty given by the manufacturer of the equipment and indicates to buyers that such equipment is covered by a manufacturer's warranty?

The Commission has carefully considered the matters set forth in your letter. It is the Commission's conclusion that:

(1) A modular house which meets one of the sets of uniform home construction codes set forth in the appendix to this letter or a construction standard established by a state for modular homes, as distinct from mobile homes as they are defined by the state, is real property and should, therefore, be excluded from the Section 101(1) definition of "consumer product". The sets of uniform codes are widely used in the construction of conventional, "stick-built" homes, which are real property. These codes are usually the basis for any distinct state modular housing codes. Thus, a factory built house which satisfies one of these sets of codes or a separate state modular code is essentially of the nature of real property and should, therefore, be excluded from coverage of the Act. On the other hand, a factory built dwelling that fails to satisfy one of the specified sets of codes or a separate state modular code must comply with the requirements of the Act.

(2) Whether a modular house is delivered to a foundation site as a completed structure or in component parts is irrelevant to the determination that it is or is not a consumer product under Section 101(1) of the Magnuson-Moss Warranty Act. The essential question is the nature of the finished product, not the location of its final assembly. If a manufactured dwelling satisfies one of the sets of uniform codes in the appendix or a state modular code, it is real property for purposes of the Act. If it fails to satisfy one of the sets of codes or a state modular code, it falls within the scope of Section 101(1) as a consumer product.

(3) Whether a modular house is sold first to a builder or instead to an ultimate consumer is irrelevant to the determination that it is or is not a consumer product under Section 101(1) of the Magnuson-Moss Warranty Act. The fundamental question is again the nature of the dwelling sold, not the identity of the initial purchaser. If a structure is personal property, normally used for personal, family, or household purposes, it is a consumer product under Section 101(1) regardless of who first purchases it from the manufacturer.

(4) A manufacturer of mobile homes who simply passes on a written warranty given by the manufacturer of equipment installed in a mobile home and indicates to buyers that such equipment is covered by a manufacturer's warranty is not a warrantor under Section 110(f) of the Magnuson-Moss Warranty Act. The Commission answered this question previously in Section 700.4 of the "Proposed Interpretations" of the Act, 41 Fed. Reg. 34,654 (August 16, 1976). Section 700.4 applies to all consumer products. This includes all consumer products sold with mobile homes, which are themselves consumer products (See Implementation and Enforcement Policy, Section 2, 40 Fed. Reg. 25,721 (June 18, 1975)), and those consumer products sold with modular homes and traditional real property structures.

By direction of the Commission.

Appendix

The Commission has concluded that a modular house which satisfies any one of the following home construction standards is real property and should, therefore, be excluded from the Magnuson-Moss Warranty Act definition of "consumer product".

(1) The codes published by Building Officials and Code Administrators (BOCA) and the National Fire Protection Association (NFPA):

(a) BOCA Basic Building Code—1975
(b) BOCA Basic Industrialized Dwelling Code—1975
(c) BOCA Basic Mechanical Code—1975
(d) BOCA Basic Plumbing Code—1975
(e) National Electrical Code—NFPA 70—1975.

(2) The codes published by the Southern Building Code Congress (SBCC) and the NFPA:

(a) Standard Building Code—1976
(b) Standard Gas Code—1976
(c) Standard Mechanical Code—1976
(d) Standard Plumbing Code—1975, with 1976 revisions
(e) National Electrical Code—NFPA 70—1975.

(3) The codes published by the International Conference of Building Officials (ICBO), the International Association of Plumbing and Mechanical Officials (IAMPO), and the NFPA:

(a) Uniform Building Code—1973
(b) Uniform Mechanical Code—1975
(c) National Electrical Code—NFPA 70—1975
(d) Uniform Plumbing Code—1973 (IAMPO).

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(4) The codes jointly published by BOCA, SBCC, ICBO, the American Insurance Association, and the NFPA:

(a) One and Two-Family Dwelling Code—1975

(b) National Electrical Code–70—1975.

Proposed marketing agreement between state association of chiropractors and mattress manufacturer (File No. 733 7014).

Advisory Opinion Letter

July 19, 1977

Dear Mr. Smith:

This is in response to your letter dated October 22, 1976, as supplemented by a letter dated March 8, 1977, requesting an advisory opinion concerning a proposed agreement between the North Carolina Chiropractic Association, Inc. (NCCA), and WRD Associates, Inc.

According to the information you have submitted, WRD Associates has patented the design of a mattress which it proposes to make available to consumers by the placement of orders directly with WRD, the manufacturer-supplier. NCCA members would make literature promoting the mattresses and order forms available in their offices, and an NCCA member's signature would be required on each order received by WRD. A commission on each sale would be paid to the NCCA chiropractor from whose office the order originated, the NCCA itself, and a yet-to-be-formed philanthropic organization promoting educational and scientific work in the field of chiropractic medicine. All sales literature would be approved in advance by the NCCA, and a disclosure of the commission program would be included in all sales literature promoting the mattresses. In addition, the NCCA and its members would have exclusive rights to promote the sale of WRD mattresses in North Carolina as long as the Association maintains sales at the rate of at least six mattresses per year per chiropractic physician.

Given the nature of the chiropractor-patient relationship, extreme care must be exercised in order that consumer deception does not result. Primarily, there would have to be a clear and conspicuous disclosure of the relationship between the NCCA and WRD on all sales literature and forms used in connection with the sale of the mattresses. Such a disclosure should, at a minimum, conspicuously and clearly reveal that the NCCA and its member chiropractors earn commissions on the sale of each mattress, that they have contracted to be exclusive sales agents for the mattresses in North Carolina, and

that this exclusive agency is contingent upon a rate of sale of at least six mattresses per year by each chiropractic physician. The contract between WRD and the NCCA should be amended to require that the promotional literature containing the disclosures actually be given to every prospective purchaser. The proposed disclosure in your letter of March 8, 1977, falls far short of this standard.

In addition, the Commission notes that you have stated that you make no claim that the mattress will ameliorate physical disorders. However, patients may fairly be expected to view chiropractors as healers rather than salesmen. Accordingly, even where no explicit claim of efficacy is made, the patient may be induced to the belief that a chiropractor is suggesting a mattress purchase as a concomitant to treatment and that the mattresses do in fact have therapeutic or corrective qualities, unless such implications are expressly negated. Therefore, unless the Association has satisfactory and sufficient scientific evidence to substantiate the therapeutic or corrective qualities of these mattresses, if any, it and its chiropractor members should refrain from a program of promoting the sale of such mattresses or should affirmatively disclose in writing to each prospective purchaser that there is no basis to believe that the mattresses will ameliorate any medical condition.

Finally, statements concerning the NCCA's approval of and participation in the sale and promotion of these mattresses should not be made in such a manner as to mislead consumers to the belief that the NCCA has established design standards for mattresses for the correction of physical defects or disorders, or that the WRD mattress has met any such standards.

Please be advised that we have limited our advice to legal issues. The Commission takes no position on any questions of ethics which might be raised by commercial activity of this nature by individual chiropractors or by the Association itself.

By direction of the Commission.

Microfiche viewing system indexing and grouping product warranties by warrantor, rather than product class, satisfies the Trade Regulation Rule on Pre-Sale Availability of Written Warranty Terms (16 CFR 702) (File No. 773 7015). (42 F.R. 39381).

Advisory Opinion Letter

July 28, 1977

Dear Mr. Croissant:

This is in response to your request for an advisory opinion regarding compliance with the Commission's Rule on the Pre-Sale Availability of Written Warranty Terms, 16 C.F.R. 702. You ask whether a microfiche viewing system which indexes and groups product warranties by warrantor, rather than by product class, satisfies Part 702.3(a)(1)(ii) of the Pre-Sale Availability Rule. Part 702.3(a)(1)(ii) provides that a seller (retailer) may meet the requirements of the rule by maintaining a binder "or [other] similar system which will provide the consumer with convenient access to copies of product warranties", 16 C.F.R. 702.1(g). The rule permits sellers to index binders according to either product or warrantor.

The Commission has carefully considered the matters set forth in your request. It is the Commission's conclusion that a microfiche viewing system which indexes and groups warranties by warrantor, rather than by product class, would satisfy Part 702.3(a)(1)(ii) of the Commission rule, if the following conditions are met:

(1) Simple, complete instructions for use of the system are posted on each viewer;

(2) Personnel in each selling establishment familiar with the operation of the system are available to assist consumers should the need arise; and

(3) The microfiche cards used to display warranties contain only warranty information.

These conditions are similar or identical to the conditions which the Commission set out in its advisory opinions to the National Retail Hardware Association, 41 Fed. Reg. 53472, and Sears, Roebuck Inc.,

42 Fed. Reg. 15679. Those opinions concerned the use of other microfiche or ultrafiche systems under the Pre-Sale Availability Rule. The requirements of those opinions remain applicable to sellers using microfiche or ultrafiche systems in which warranties are grouped and indexed by product class rather than by warrantor.

Your request referred only to microfiche viewing systems. The Commission believes that the differences between microfiche and ultrafiche systems are irrelevant for the purpose of complying with the Pre-Sale Availability Rule. Therefore, this opinion is also applicable to ultrafiche systems in which warranties are indexed and grouped by warrantor.

By direction of the Commission.

Compliance advisory opinion as to whether three affiliated sellers of correspondence courses have properly determined which former students are eligible for partial tuition refunds under a consent order issued against the firms (88 F.T.C. 683, Docket No. 8963).

Advisory Opinion Letter

September 2, 1977

Gentlemen:

This is to advise you that the Commission has given consideration to your submission under cover of your letters of May 17, and June 29, 1977, of questionnaires which you have sent out pursuant to the order in the above referenced matter and the determinations you have made with respect thereto regarding eligibility for tuition refund as prescribed by said order. In accordance with said order you have submitted said questionnaires for review by the Commission and an advisory opinion as prescribed in Section 3.61(d) of the Commission's Rules of Practice.

Except as noted below, the Commission has determined that your submission represents compliance with the applicable order provisions regarding eligibility of former Lafayette Academy students for partial tuition refunds.

Four completed questionnaires (Appendices 1–4) which you determined to be not payable contained, in response to Question 7, a multiple answer by the student as to why he or she failed to complete the course or failed to seek employment. In these circumstances, where one answer would qualify the former student for eligibility under the Commission's order even though non-qualifying answers were also provided, the Commission is of the opinion that these claims should be honored.

Fourteen questionnaires (Appendices 5–18) which you determined to be not payable contained narrative responses to Question 7 which suggest that the students' failure to complete or to job-search was reasonably related to the sufficiency or quality of the training or job demand as provided for in subparagraphs 5(b)(2) or 5(c) of Part III. The Commission believes that these claims should also be honored.

A group of six questionnaires (Appendices 19–24) were from students who had completed their respective courses, had sought employment but had not obtained employment in the relevant occupations. The Commission is of the opinion that these responses meet the criteria for eligibility contained in the Commission's order and these former students are therefore eligible for refund.

In addition, four former students (Appendices 25–28) by their questionnaires advised that they did not complete their courses because they did not receive necessary study materials or tests from your organization. The Commission's view is that failure to receive such course materials fairly relates to the sufficiency or quality of the training, and that these former students are eligible for refund. Finally, three former students which you have determined to be not eligible (Appendices 29–31) stated that they had failed to complete their particular courses for the reason indicated in item 7j of the questionnaire: "I decided that the course would not help me get a job." This response, in the Commission's view, relates to the sufficiency or quality of the training and/or job demand. Therefore, these students should be determined to be in the eligible class.

It is the opinion of the Commission, based upon the information furnished that with the exceptions noted hereinabove, your eligibility determinations under Part III, paragraph 5 of the Commission's order represent compliance with that provision to the extent that your obligations under other order provisions have been fulfilled. This opinion is not intended to apply to any other duties or obligations imposed upon you by the order other than your responsibility under Part III to make initial determinations as to who constitutes eligible class members for purposes of the required tuition refunds.

The student questionnaires are being returned to you under separate cover.

By direction of the Commission.

Notice required by Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses (16 CFR 433) must be inserted in the consumer credit contract at the time it is taken or received by the seller. Affixing the Notice immediately prior to negotiation to a third party is unacceptable (File No. 783 7001).

Advisory Opinion Letter

October 27, 1977

Dear Mr. Bemesderfer:

This is in response to your September 15, 1977 request for an advisory opinion regarding compliance with the Trade Regulation Rule concerning Preservation of Consumers' Claims and Defenses, 16 C.F.R. Part 433.

Specifically, your request pertains to the location and timing of the required Notice. The Rule declares it an unfair or deceptive act or practice to "take or receive a consumer credit contract which fails to contain" the Notice, 16 C.F.R. Section 433.2(a). The answers to the four questions posed in your letter are implicit in the language of the Rule.

Whether or not a contract properly contains the Notice turns upon whether it is a legally enforceable term under state law at the time the contract is taken or received. As a general matter of state law, any term of a contract must be agreed upon by both parties, as ordinarily evidenced by a document the parties execute. This general principle of contract law suggests that it would be highly unlikely that any consumer could enter into a contract governed by the Rule without receiving or having knowledge of the Notice as one of the terms of the underlying contract.

The Commission specifically addressed your third question in its recent denial of petitions for exemption by the National Retail Merchant Association and the American Retail Federation, 42 F.R. 46509 *et seq.* (September 16, 1977). It rejected the concept of affixing the Notice immediately prior to negotiation to a third party rather than at the time of execution. In its denial the Commission reaffirmed the Rule's requirement that the Notice be inserted in the consumer credit contract at the time it is taken or received by the

seller. On balance, the Commission concluded that incorporation at the time of making was the only certain means of protecting the consumers' rights, 42 F.R. 46512.

The response to your third question also answers the fourth question.

Finally, you suggest that two-party open end consumer credit contracts have not previously been subject to the Rule's requirements. In fact, the Rule has applied to two-party open end consumer credit contracts since May 14, 1976, although such contracts have been exempted from compliance with the Rule until October 31, 1977.

By direction of the Commission.

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Modular housing, meeting certain home construction standards, is not a "consumer product" under the terms of section 101(1); and a mobile home manufacturer who simply passes on warranties offered by the manufacturer of equipment installed in mobile home is not a "warrantor" under the terms of section 110(f) of the Magnuson-Moss Warranty Act (15 U.S.C. 2301 *et seq.*) [*File No. 773 7013, Keller, Thoma, Toppin & Schwarze, July 7, 1977*] 980

Proposed marketing agreement between state association of chiropractors and mattress manufacturer [*File No. 773 7014, North Carolina Chiropractic Association, Inc., July 19, 1977*] 984

Microfiche viewing system indexing and grouping product warranties by warrantor, rather than product class, satisfies the Trade Regulation Rule on Pre-Sale Availability of Written Warranty Terms (16 CFR 702) [*File No. 773 7015, Liberty Distributors, Inc., July 21, 1977*] 986

Compliance advisory opinion as to whether three affiliated sellers of correspondence courses have properly determined which former students are eligible for partial tuition refunds under a consent order issued against the firms [*Docket 8963, Lafayette United Corporation, et al., September 2, 1977*] 988

Notice required by Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses (16 CFR 433) must be inserted in the consumer credit contract at the time it is taken or received by the seller. Affixing the Notice immediately prior to negotiation to a third party is unacceptable [*File No. 783 7001, Montgomery Ward & Co., Incorporated, October 27, 1977*] 990

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